DOCKET

Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [06/27/88]

CASE NBR: [87-1757] [CFX] CASE STATUS: [ ]
SHORT TITLE: [Reed, Rex H.]
VERSUS [Collyer, Rosemary, etc.] DATE DOCKETED: [04/25/88]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 25 1988		Petition for writ of certiorari filed.
May 25 1988		Brief of respondent Rosemary M. Collyer in opposition filed.
May 31 1988		DISTRIBUTED. June 15, 1988
Jun 2 1988		Reply brief of petitioner Rex H. Reed filed.
Jun 17 1988		REDISTRIBUTED. June 23, 1988
Jun 21 1988		Supplemental brief of petitioner Rex H. Reed filed.
Jun 27 1988		Petition DENIED. Dissenting opinion by Justice Scalia. (Detached opinion.)
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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
APR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

87 - No. 87 57

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REX H. REED,

Petitioner,

v.

ROSEMARY M. COLLYER,
GENERAL COUNSEL OF THE NATIONAL
LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT and APPENDIX

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April 26, 1988

QUESTION PRESENTED

Whether the authority of the General Counsel of the National Labor Relations Board, exercised pursuant to § 3(d) of the National Labor Relations Act (29 U.S.C. § 153(d)), is immune from the judicial review under 28 U.S.C. §§ 1331 and 1337 where:

a) the authority has been exercised in a manner that violates the United States Constitution; and

b) the General Counsel has announced a standard for exercising § 3(d) authority that provides for issuance of an unfair labor practice complaint when an unfair labor practice charge presents an arguable violation of the National Labor Relations Act, has found an arguable violation in petitioner's case, but nonetheless and without rational basis, has refused to exercise her authority consistent with the standard announced.

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No. 87-____

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REX H. REED,

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ROSEMARY M. COLLYER,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth Circuit is reproduced as Appendix A to this petition. The unreported opinion of the United States District Court for the Middle District of Tennessee is reproduced as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues concerning the general federal question jurisdiction of United States district courts under 28 U.S.C. §§ 1331 and 1337 to consider equal protection due process issues under the Fifth Amendment to the United States Constitution. The National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, is also involved.

STATEMENT OF THE FACTS

1. This case stems from the decision by the General Counsel of the National Labor Relations Board ("NLRB" or "Board") to dismiss certain unfair labor practice charges filed by Rex H. Reed, Esq., Executive Vice-President and Legal Director of the National Right to Work Legal Defense Foundation ("the Foundation") for reasons which on their face violate the mandates of the United States Constitution.

On August 7, 1985, Rex H. Reed filed unfair labor practice charges against General Motors Corporation and the United Automobile, Aerospace and Agricultural Implement Workers of America ("United Auto Workers" or "UAW") under §§ 8(a)(1), (2) and (3) and §§ 8(b) (1)(a) and 8(b)(2) of the National Labor Relations Act , as amended (29 U.S.C. §§ 151, *et seq.*). The charges, and the documentation accompanying the charges, establish that General Motors Corporation and the UAW violated the National Labor Relations Act ("NLRA" or "Act") by entering into a collective bargaining agreement and effecting that agreement before a representative complement of employees (or indeed, any employees whatsoever) had been hired at the new General

Motors Saturn facility to be built in Spring Hill, Tennessee. The charges also describe facts establishing that General Motors has given the UAW unlawful support and assistance, has granted the UAW premature recognition, and has implemented a plan in concert with the UAW which would discriminate against non-UAW members with regard to employment opportunities at the new Saturn facility. As a matter of fact, the agreement between the representatives of Saturn and the United Auto Workers specifically states that:

> "During the period of organization and start-up, certain particular skilled personnel will be required, including operating technicians and skilled technicians, virtually all of whom will come from UAW-represented units; therefore, the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex."[1]

Appendix D at 14a.

Shortly after the charges were filed, Steven B. Schlossberg, formerly General Counsel of the UAW and then an Undersecretary of Labor, conducted a private meeting with the General Counsel of the NLRB. Freedom of Information Act requests filed with the NLRB and with the Department of Labor verified that the meeting did occur. Both the General Counsel and Mr. Schlossberg

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[1] In an article appearing in the May 1987 UNION DEMOCRACY REVIEW, Owen Bieber, President of the UAW, stated in response to criticism of the pre-hire agreement that:

> We reached an agreement before the workforce was hired because we wanted to insure that Saturn would be located in the U.S. and that the UAW would be involved in Saturn from day one. . . .

Appendix F at 46a-47a.

claimed that the exact content of the discussion at the meeting was "privileged."[2]

Prior to the case reaching Washington, D.C., and personal handling by the NLRB's General Counsel, the NLRB's Regional Director for the Seventh Region investigated the unfair labor practice charges and *recommended that an unfair labor practice complaint issue against both General Motors and the UAW*.[3] After this decision, the case was removed from the normal purview of the Regional Director and directed to the General Counsel's Division of Advice in Washington, D.C.

On June 2, 1986 (over one year later), the General Counsel, nominally through her Division of Advice, overruled the Regional Director and concluded that the charges against General Motors and the United Auto Workers should be dismissed.

In this decision, the General Counsel claimed that there was no premature recognition of the UAW by General Motors because, in her words, "[the parties had not] entered into a functioning collective bargaining relationship. . . ." (Appendix D at 25a) and because "the investigation . . . does not support the allegation that GM is now recognizing the UAW." Appendix D at 28a n.12. Inconsistent with her previous logic, the General Counsel further concluded that any "bargaining" between

[2] Mr. Schlossberg, then Undersecretary of Labor, was for the majority of his career a lobbyist and attorney for the United Auto Workers and was lead counsel for the UAW in a major (unsuccessful) LMRDA suit against the National Right to Work Legal Defense Foundation. *See International Union, UAW v. National Right to Work Legal Defense Foundation (NRTWLDF v. Ritchie)*, 366 F. Supp. 46, 84 (D.D.C. 1973).

[3] Ordinarily, a complaint would issue on the basis of such a decision by the Regional Director.

the UAW and General Motors Corporation was the result of "lawful effects bargaining." Without even the slightest effort to address either Supreme Court cases directly on point or NLRB decisions conflicting with her analysis, the General Counsel dismissed the charges while simultaneously admitting them to be "arguable" violations of the Act. Thus, she failed even to adhere to the "standard" she herself adopted for determining when unfair labor practice complaints should issue—precisely upon "arguable" violations of the Act.[4]

2. Following the decision by the General Counsel, Rex Reed filed suit against her in the United States District Court for the Middle District of Tennessee. Reed alleged that his unfair labor practice charges were handled in a manner that violated the United States Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* (Supp. III). Petitioner Reed sought a declaratory judgment against the unlawful, *sui generis* manner in which his unfair labor practice charges were dismissed in violation of the stated standard for complaint issuance. He also sought an injunction requiring the General Counsel to proceed to exercise her responsibility over the unfair labor practice charges in accordance with the well-established case law authorities developed by the Supreme Court and the NLRB, the admis-

[4] For purposes of background, it is noted that the § 3d exercise of authority by the General Counsel has been the subject of congressional inquiry. In the April 1975 testimony of former NLRB Chairman Betty Murphy in the House Oversight Hearings on the NLRB, she stated that "General Counsels have generally recognized an *obligation* of the General Counsel to issue unfair labor practice complaints in 'close' cases, thus presenting the basic issues to the Board and, ultimately, to the courts for review." Hearings Before the Subcommittee on Labor-Management Relations of the Committee on Education, House of Representatives, 94th Congress, 1st Session 41 (1975)("Hearings")(emphasis added).

sions of record, and the General Counsel's own stated standard calling for complaints to issue in "arguable" violations of the Act.

Respondent moved to dismiss petitioner's complaint on the grounds, *inter alia*, that a district court is without subject matter jurisdiction to consider allegations raising due process and equal protection claims brought against the General Counsel of the NLRB. The district court granted respondent's motion and dismissed petitioner's complaint on subject matter jurisdiction grounds. The district court ruled in general terms that it was without subject matter jurisdiction; and it therefore refused to consider whether or not the NLRB's General Counsel violated petitioner's constitutional rights when she refused to issue unfair labor practice complaints against General Motors and the UAW. By concluding that it was without subject matter jurisdiction, the district court avoided addressing petitioner's constitutional claims.

3. On further appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment, holding that the General Counsel's decision not to issue unfair labor practice complaints is not subject to judicial review. The court also concluded that 28 U.S.C. §§ 1331, 1337 and 1361 did not provide an independent source of subject matter jurisdiction and held that the APA did not afford an implied grant of subject matter jurisdiction. In so doing, the court of appeals did not mention petitioner's claim that a federal district court has jurisdiction to hear and decide petitioner's constitutional claims.

REASONS FOR GRANTING THE WRIT

This case raises an important question of law never addressed by this Court, to wit: whether a federal district court has subject matter jurisdiction to adjudicate a *constitutional* challenge to the decision-making process used by the NLRB's General Counsel to determine whether an unfair labor practice complaint should issue. Unlike the *typical* case of an individual complaining that his rights have been infringed by the NLRB General Counsel's refusal to issue an unfair labor practice complaint, this *atypical* case presents the unique issue of *whether the General Counsel's arbitrary refusal to adhere to her own stated standard for issuing complaints* violates petitioner's due process and equal protection rights.

This case does *not* present a challenge to the General Counsel's authority under § 3(d) of the NLRA to issue or not to issue unfair labor practice complaints under normal circumstances. Moreover, should petitioner achieve a favorable result in this Honorable Court, it would *not* mean that every disgruntled unfair labor practice charging party who has had his charge dismissed would be entitled to court review of the General Counsel's decision. Rather, this case presents the sole question of whether a federally created right (under the NLRA) can be taken away, without equal protection of the laws, by a federal official appointed to be the guardian of that right.

I. The congressional grant of authority to the General Counsel of the National Labor Relations Board under 29 U.S.C. § 153(d) does not also extend to the General Counsel the power to exercise this authority in a manner that violates the Constitution.

In enacting § 3(d) of the NLRA (29 U.S.C. § 153(d)), Congress did not limit the subject matter jurisdiction of

United States district courts over factually substantiated claims that the General Counsel has exercised authority in violation of constitutional equal protection and due process rights. In fact, Congress could not provide a statutory scheme that would allow a federal official to act so as to ignore rights guaranteed by the Constitution. If Congress did provide such a scheme, the statute itself would bear the stigma of unconstitutionality under the Fifth and Fourteenth Amendments. *Harmon v. Brucher*, 355 U.S. 579 (1958). In the instant case, this Honorable Court is called upon to answer explicitly the question of whether Congress, when it enacted § 3(d) of the NLRA (29 U.S.C. § 153(d)), intended the statute to be interpreted and applied in a manner consistent with the requirements of the Constitution. Petitioner believes the answer to this question must be yes.

The court of appeals' view that it had no jurisdiction, under any circumstances, to review the process pertaining to the refusal of the General Counsel to issue an unfair labor practice complaint ignored the inherent power of a federal court to provide equitable relief. The instant complaint's jurisdictional bases of 28 U.S.C. §§ 1331 and 1337 constitute the historical grounds for equitable relief by a federal court where a federal agency acts arbitrarily, or in excess or derogation of, statutory or constitutional authority. *See*, Jaffee, *The Right to Judicial Review*, 71 HARV. L. Rev. 401 (1958); Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966-67 (1969).

The practical reality of the court of appeals' conclusion is staggering. Its holding in effect means that the actions of the General Counsel are immunized from judicial review for constitutional error even if she chooses to

exercise her § 3(d) "final authority" in a manner that violates the Constitution. To say the least, enactment of a statute intended to have such an effect would raise serious constitutional questions about the validity of the statute. *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2141 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366-68 (1974). *See also Califano v. Sanders*, 430 U.S. 99, 109 (1977); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 25-29 (1980); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984). Such a statute would not only deprive affected parties of due process of law, but would also threaten the courts' role as the final arbiters of the Constitution.[5]

This Court has held that, "[w]hen dealing with constitutional rights," due process requires that "there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936). Due process considerations also require that an agency not be permitted to function as "an island entire of itself." JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 327 (1965). "The very subordination of the agency to judicial

[5] These considerations apply whether the plaintiff directly challenges the constitutionality of a statute as in *Johnson v. Robison*, or, as here, the unconstitutional implementation of a statute. *Cardenas v. Smith*, 733 F.2d 909, 918-19 (D.C. Cir. 1984); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981); *Devine v. Cleland*, 616 F.2d 1080, 1084 (9th Cir. 1980); *Ralpho v. Bell*, 569 F.2d 607, 618, 620 (D.C. Cir. 1977).

jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with . . . the ultimate guarantees associated with the Constitution." *Id.* Thus, on the rare occasions when the lower courts have been faced with such due process challenges, they have ruled that due process requires availability of a judicial forum for resolution of constitutional claims. *Bartlett v. Bowen*, 816 F.2d 695, 704-07 (D.C. Cir. 1987); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

II. The General Counsel of the National Labor Relations Board has in this case refused to adhere to her own standard for when an unfair labor practice complaint should issue, and this action violates petitioner's constitutional rights.

It is clear, from the Act itself, that the General Counsel is the repository of the power to initiate and continue the prosecution of unfair labor practice complaints. *See* 29 U.S.C. § 153(d). That power is loosely referred to as "prosecutorial," and it is certainly somewhat prosecutorial in nature. Rosenblum, *A New Look At The General Counsel's Decision Not To Issue Complaint Under The NLRA*, 86 YALE L. REV. 1349 (1977). The power is also loosely referred to as "unreviewable" in regard to the propriety of its exercise, and certainly review is not routinely available. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *NLRB v. United Food & Commercial Workers Union*, 53 U.S.L.W. 4037 (U.S. December 14, 1987). But the Act itself nowhere defines the power's scope or limitations, nor does it furnish a standard, such as "probable cause" or one of similar general acceptance, against which to measure its exercise.

In addition, the "prosecutorial discretion" exercised by the General Counsel is narrowly confined and therefore does not render review of her decisions wholly impracticable. Even more telling is the fact that the check or curb on a prosecutor's power frequently is the ability of a crime victim to petition state or local authorities for relief. Due to the preemptive effect Congress has accorded the NLRA, this avenue is not available to the victim of an abuse cognizable by the NLRB. Furthermore, the General Counsel and her subordinates are given clearer statutory guidelines concerning the investigation of cases than is the typical public prosecutor. NLRA §§ 10(d)[6] and (m)[7] give investigative priority to specified unfair labor practice charges, and § 10(l) directs the Regional Attorney to petition for injunctive relief if he has reasonable cause to believe certain types of violations have occurred.[8] Congress has made a judgment regarding the relative importance of statutory violations; any further judgments by the General Counsel go beyond congressional intent. Moreover, unlike the public prosecutor, the General Counsel operates in a context which lacks the long tradition of recognizing as relevant to "prosecutorial discretion" factors other than the likelihood of proving a statutory violation.

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[6] 29 U.S.C. § 160(d) (1970) (mandating investigative priority for charges of secondary boycotts and certain recognition strikes).

[7] 29 U.S.C. § 160(m) (1970) (mandating investigative priority, except for cases given priority under subsection (1), for charges of employment discrimination on account of union membership or nonmembership).

[8] Compare 29 U.S.C. § 160(l) (1970) (directing Regional Attorney to file for appropriate injunctive relief after he has reasonable cause to believe complaint should issue) with 29 U.S.C. § 160(j) (no requirement that Regional Attorney seek injunction for stated violations).

Not only are the guidelines governing the General Counsel's decisions stricter than those governing the decisions of a public prosecutor, but the institutional structure in which the General Counsel operates precludes analogy to a district attorney. The Supreme Court explicitly rejected the analogy in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).[9]

There is no doubt that an impressive statement of legislative history can be detailed for the broad proposition that the General Counsel's discretion in deciding whether to issue complaints is unreviewable. In proceedings below, respondent specifically relied on Senator Taft's remark that the General Counsel's "function" in deciding whether to issue complaints "is like that of the Attorney General of the United States or a state attorney general" and is unreviewable. LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1623, Cong. Rec. 7001. However, Senator Taft's remarks on that point must be considered in their entirety, as he, recognizing the need for a check on the General Counsel's vast power, provided a crucial qualifier to the analogy:

> What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress. *So far as having unfettered discretion is concerned he, [the General Counsel] of course, must respect the rules of decision of the Board and of the courts. In this respect* his function is like that of the Attorney General of the United States or a state attorney general.

[9] The *Sears* case implicitly recognized that inconsistency with prior administrative case law is a possible ground for overturning administrative decisions. For this reason the Court held that General Counsel "Advice" and "Appeals" memoranda were discoverable pursuant to a Freedom of Information Act request.

Id. (emphasis added). Petitioner's case highlights the need to identify the district courts' scope of review as one that protects private parties' unfair labor practice charges from arbitrary treatment and ensures that new and important questions requiring interpretation of the NLRA are settled initially by the Board and ultimately by the courts reviewing the Board's decisions.

In addition, the General Counsel's discretion must be limited by the proscriptions of the NLRA, the NLRB and the courts, and by the United States Constitution. Where there are rights plainly developed via these avenues, the General Counsel has no authority to restrain such rights. Where there is a deprivation of a right assured to employees by Congress, a federal district court has jurisdiction of an original suit to prevent deprivation of a right so given. *Leedom v. Kyne*, 358 U.S. 184, 189 (1958).

In *Leedom*, when confronted with the very issue of federal district court review of the NLRB decision-making process, this Court rejected the view that a district court was foreclosed from considering an original action in equity raising statutory considerations.[10] *Leedom* presented the Supreme Court with the question of whether a federal district court had jurisdiction to entertain a suit to set aside a determination of the NLRB which was contrary to law and in excess of its powers.

[10] Even before *Leedom* it had been established that judicial review of constitutional issues was cognizable. *American Federation of Labor v. N.L.R.B.*, 308 U.S. 401 (1939).

Specifically, *Leedom* involved an NLRB unit determination, not incorporated in an NLRB order, which included nonprofessionals in a unit of professionals without complying with the NLRA § 9(b)(1) requirement that such inclusion must first be approved by the professionals. Federal district court jurisdiction was challenged by the NLRB, but upheld by the Court.

The *Leedom* Court went to great lengths to explain away an argument similar to that advanced by the General Counsel below and accepted by the lower courts, to wit: that because no remedy had been expressly provided by Congress to redress a breach of a congressionally created right, that right could not be enforced through an original action in federal district court. In answer to this contention, the Court stated:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded * * *. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose * * *. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated."

Leedom, *supra* at 184, citing *Texas & New Orleans R. Co. v. Brotherhood of Railway & S.S. Clerks*, 281 U.S. 548, 568-69 (1930).

In the circumstances of the instant case, to accept the view of the lower courts would compel the conclusion that having written into the Act a proscription against employers and labor organizations entering into a collective bargaining relationship without the authorization of a majority of the employees involved, Congress nevertheless intended its desire to have the General Counsel serve with "unreviewable discretion" render that same proscription nugatory.

The argument against such a conclusion is even more compelling when one considers the fact that the General Counsel has exercised her discretion in this case in a manner which ignores even her own stated standard for when an unfair labor practice complaint should issue.

Since Congress created the NLRB, standards for complaint issuance and prosecution have been developed. For example, former NLRB Chairman Betty Southard Murphy responded to a relevant inquiry from a congressional committee by saying that, "Over the years General Counsels have generally recognized an obligation to issue complaints in 'close' cases or on novel legal theories, thus presenting the basic issues to the Board and ultimately to the Courts for review." Hearings, *supra*, note 4, at 41. Chairman Murphy, speaking for the Board before Congress, went on to state, "So long as such a practical accommodation continues to operate, there is no reason to anticipate serious problems affecting the Board's ability to discharge its responsibilities with respect to unfair labor practice proceedings." *Id.* The "practical accommodation" for which Ms. Murphy had such high hopes works to avoid obvious and profound statutory and constitutional difficulties only if complaints issue in "close cases."

Ms. Murphy's "close cases" standard, represented to Congress, is remarkably similar to the standard for complaint issuance articulated by the incumbent General Counsel for cases other than the present one. In her so-called "drug testing" memorandum (Appendix E to this petition), General Counsel Collyer instructs that complaints should issue in all cases presenting "arguable" violations of the law. Appendix E at 34a. There may be undiscernible differences in a "close case" and an "arguable case" standard, but petitioner takes them to mean the same thing in terms of the "practical accommodation" Ms. Murphy presented to Congress.[11] Of course, if those expressions do not frame the complaint issuance standard, or are variously employed, this Court should grant *certiorari* to state the constitutionally correct standard.

The difficulty in this case is narrower than deciding what kind of standard should apply for the General Counsel to exercise her authority, for the incumbent General Counsel did not adhere to her own stated standard in deciding not to issue a complaint here. As noted, her drug testing memorandum frames the proper inquiry in terms of "arguable violations." Yet, the General Counsel's disposition in the instant case concedes the violation alleged to be "arguable." For she states that in the charges before her "[the] issue is not free from doubt." Appendix D at 26a. Thus, in this case, the incumbent General Counsel has refused to issue a complaint where the charge meets her own stated complaint issuance standard.

[11] Ms. Murphy's statements regarding the complaint issuance function of the General Counsel have been echoed by other NLRB Chairmen. As a matter of fact, Chairman Dotson, in a December 1986 letter to Attorney Glenn M. Taubman (attached as Appendix G), stated his understanding of the law regarding the General Counsel's § 3(d) authority as one in which judicial review would be available where constitutional violations have occurred. Appendix G at 61a.

In reality the General Counsel's refusal to issue a complaint has severe consequences. In many, many instances, it is the end of the road for cases of merit or "arguable" merit. This is so because of the application of the extra-statutory doctrine of preemption. The preemption doctrine requires that "arguable" charges of unfair labor practice be brought to the NLRB General Counsel for prosecution, and, when complaints do issue, to the NLRB for hearing and relief. This often means that parties are denied alternative forums otherwise available to them; and, in turn, the General Counsel's "discretion" denies them the Board forum.

Beyond the consequences for the parties involved, this approach denies the Board its statutorily assigned role in determining national labor policy. It denies the appellate courts, as well, of jurisdiction to decide fundamental issues of statutory construction. In essence, the incumbent General Counsel's refusal to honor the "practical accommodation" represented to Congress creates the "labor Czar" about which Congress fretted in 1947. Her refusal to adhere to her own stated standard so demeans the complaint issuance function as to render it whimsical in every respect.

In both the narrow and the larger context, this case clearly raises due process/equal protection issues that are deeply troubling. For, "[o]ur whole system of law is predicated on the general, fundamental principle of equality of application of the law." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). "We begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986). This presumption has its roots in Chief Justice Marshall's in-

sistence that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'" *Id.* at 2136, *citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Cases which concern fundamental rights are to be analyzed under the "compelling interest" test. Even assuming *arguendo* that a "*rational basis*" test were appropriate, the petitioner should have prevailed on either theory below, for there is no statutory standard, nor any consistently applied standard at all, employed by the General Counsel.

The doctrine of separation of powers also requires that judicial review of petitioner's constitutional claim be available. *Bartlett v. Bowen*, 816 F.2d at 703, 707; REDISH, *supra*, at 24-35. At least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been clear that the judiciary, not the executive branch, is charged with ultimate responsibility for determining what the Constitution requires. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). "Congress cannot employ its Article III power to . . . limit lower federal court jurisdiction in such a manner that improperly abridges the implied constitutional mandate of separation of powers." REDISH, *supra*, at 29 (footnote omitted). At the very least, the separation of powers doctrine means that the General Counsel cannot be endowed with the power to deny individuals constitutional due process. *Bartlett v. Bowen*, 816 F.2d at 707. If the General Counsel's contention that a federal district court is without jurisdiction to consider her actions, even when they are claimed to be inconsistent with the Constitution, is accepted by this Court, the General Counsel can claim immunity from judicial review of a policy requiring the dismissal of unfair labor practice charges of black employees because they are black, female employees

because they are female, or blonde employees because they are blonde—a result the court of appeals simply ignored.

But the even more profound injustice worked in this case is not in the General Counsel's actions, but in those of the lower courts. They held, *sub silentio* on the constitutional point, with no articulated basis whatsoever, that the district court had no jurisdiction to even consider the petitioner's due process/equal protection claim. These holdings overlooked or ignored the jurisdictional allegations of the complaint, Article III, Section 2 of the United States Constitution, and this Court's unbroken line of decisions adhering to that provision's mandate and the explicit language of § 1331: "The district courts shall have jurisdiction of all civil actions arising under the Constitution. . . ." Surely departures from such fundamental precedents require this Court's remedial consideration through a writ of certiorari.

CONCLUSION

The decision of the court of appeals is an unwarranted limitation upon the general federal question jurisdiction of the federal courts. Congress did not—what is more, could not—intend to exclude from the judiciary's traditional supervisory jurisdiction the power to enforce the requirements of the United States Constitution. Congress has, however, set up a statutory scheme through 29 U.S.C. § 153(d) which, on its face, would appear to give the General Counsel "unreviewable discretion" to interpret the National Labor Relations Act without limitation. It is respectfully submitted that this Court should grant this petition for certiorari to settle the question of whether this "unreviewable discretion" must be exercised

in a manner which comports with the requirements of the United States Constitution.

Respectfully submitted,

ROSSIE D. ALSTON, JR.
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Petitioner

HUGH L. REILLY
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Dated: April 26, 1988

APPENDICES

APPENDIX A

Order of the U.S. Court of Appeals for the Sixth Circuit

January 27, 1988

No. 87-5641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REX H. REED, Plaintiff-Appellant,	)	
v.	)	ORDER
ROSEMARY COLLYER, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, Defendant-Appellee.	)	Filed: January 27, 1988

BEFORE: LIVELY, Chief Judge; JONES and BOGGS, Circuit Judges.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel unanimously agrees that oral argument is not necessary. Fed. R. App. P. 34(a).

Plaintiff appeals the district court's judgment dismissing his labor complaint. Plaintiff is an official of the National Right to Work Legal Defense Foundation, and defendant is General Counsel for the National Labor Relations Board. Plaintiff brought suit alleging that defendant had acted arbitrarily in refusing to issue an unfair labor practice complaint against General Motors and its union the UAW. The district court dismissed the complaint for lack of subject matter jurisdiction. Upon review, we conclude the district court properly dismissed the complaint.

General Counsel's decision not to issue an unfair labor practice complaint is not subject to judicial review. *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Echols v. NLRB*, 525 F.2d 288 (6th Cir. 1975). Further, 28 U.S.C. §§ 1331, 1337 and 1361 do not provide an independent source of subject matter jurisdiction. *See Louisville and Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983). Nor does the Administrative Procedure Act afford an implied grant of subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977).

Accordingly, the district court's judgment is hereby affirmed pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

APPENDIX B

Order and Memorandum of the U.S. District Court for the Middle District of Tennessee

May 7, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
COLUMBIA DIVISION

REX H. REED	)	
	)	
v.	)	NO. 1-87-0004
	)	Filed: May 7, 1987
ROSEMARY COLLYER, General Counsel of the National Labor Relations Board	)	
	)	

ORDER

For the reasons stated in the accompanying Memorandum, the Court dismisses this action for lack of jurisdiction of the subject matter.

/s/ Thomas A. Wiseman, Jr.

THOMAS A. WISEMAN, JR.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
COLUMBIA DIVISION

REX H. REED)
)
v.) NO. 1-87-0004
) Filed: May 7, 1987
ROSEMARY COLLYER, General)
Counsel of the National Labor)
Relations Board)
)

MEMORANDUM

In this case, plaintiff seeks a determination that the defendant General Counsel of the National Labor Relations Board acted arbitrarily and capriciously in dismissing unfair labor practice charges filed by plaintiff. A mandatory injunction is sought from this Court to require issuance of such charges. It is now before the Court on defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

The case grows out of an alleged agreement between General Motors Corporation (GM) and the United Automobile Aerospace and Agricultural Implement Workers of America (UAW). The agreement, *inter alia*, deals with preferential hiring of UAW members at the new Saturn plant under construction in Tennessee. Plaintiff in this case is the Executive Vice President of the National Right to Work Legal Defense Foundation. In

such capacity he filed unfair labor practice charges against GM and UAW insisting that the agreement between them violated certain provisions of the National Labor Relations Act (NLRA).

The charges were investigated by the Board's Regional Director for the Seventh Region and referred to the General Counsel's Division of Advice (Advice) in Washington. Written pleadings and oral argument were presented to the General Counsel. Upon the analysis and recommendation of Advice, the General Counsel dismissed the charges. An appeal was taken to the Office of Appeals of the NLRB General Counsel, which was denied.

Plaintiff then initiated this suit in this Court alleging jurisdiction under the Constitution and laws of the United States, 28 U.S.C. §§ 1331, 1337, 1361 and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. The actions and refusals to act by the General Counsel are alleged to be arbitrary, contrary to law, and unwarranted by the facts.

Discussion

The law is well settled [1] that the decisions of the General Counsel for the NLRB are not subject to judicial review. *First*, the statute itself provides that such decisions are *final*.

> He (the General Counsel) shall have final authority, on behalf the Board, in respect of the investigation of charges *and issuance of complaints* under section 160 of this title, *and in respect of the prosecution of such complaints* before the Board. . . .

[1] The Court momentarily considered whether this might be an appropriate case for the imposition of Rule 11 sanctions, but has concluded that plaintiff brought this action, without labeling it as such, as a "good-faith argument for . . . reversal of existing law." Fed. R. Civ. P. 11.

29 U.S.C. § 153(d) (emphasis added). *Secondly*, the legislative history of the Act exposes a clear recognition on the part of Congress that such discretion in the General Counsel was intended. *See, e.g.*, Comments of Senator Taft, Leg. Hist. of L.M.R.A., 1947, p. 1622-23, 93 Cong. Rec. 7001; House Conf. Report No. 510, on H.R. 3020 at 37, Leg. Hist. of L.M.R.A., 1947, p. 541; Statements by Congressional Opponents, *e.g.*, Rep. Smith, *id.* at 900-901, 93 Cong. Rec. A. 2801; Sen. Murray, *id.* at 1567, 93 Cong. Rec. 6655; Veto Message of Pres. Truman, *id.* at 918, 93 Cong. Rec. 7500. *Thirdly*, the Supreme Court has consistently upheld the unreviewable discretion of the General Counsel in this regard.

> A charge of an unfair labor practice may be presented to the Board, but the person or group making the charge does not become the actor in the proceeding. It is the Board, *and the Board alone or its designated agent*, which has the power to issue its complaint against the person charged with the unfair labor practice.

Amalgamated Utility Workers v. Consolidated Ed. Co., 309 U.S. 261, 264-5, 60 S.Ct. 561, 84 L.Ed. 738 (1940) (emphasis added).

> [T]he Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.

Vaca v. Sipes, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

> In the case of decisions *not* to file a complaint, the memoranda effect as "final" a "disposition" . . . as an administrative decision case—representing, as it does, an unreviewable rejection of the charge filed by the private party.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (emphasis in original).

> To be sure, the Board's General Counsel could theoretically bring a separate unfair labor practice charge against the Union, *but he could also in his unreviewable discretion refuse to issue such a complaint.*

Detroit Edison Co. v. NLRB, 440 U.S. 301, 316, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979) (emphasis added).

This principle of unreviewability has been asserted by all the circuits. *See Rockford Redi-Mix Co. v. Zipp*, 632 F.2d 30, 32 n. 5 (7th Cir. 1980) (collecting cases), *cert. denied*, 450 U.S. 929, 101 S.Ct. 1388, 67 L.Ed.2d 362 (1981).

This Court lacks jurisdiction, and the motion to dismiss under 12(b)(1), Fed. R. Civ. P. is granted. A corresponding order shall issue.

/s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX C

Letter of NLRB General Counsel
Rosemary M. Collyer

November 14, 1986

SEAL | NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

14 November 1986

General Motors Corp., Saturn Corp.
Case No. 7-CA-24872

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW
Case No. 7-CB-6582

Rossie D. Alston, Jr., Esq.
National Right To Work
Legal Defense Foundation, Inc.
8001 Braddock Road
Springfield, Virginia 22160

Dear Mr. Alston:

Your appeal from the Regional Director's refusal to issue complaint in the captioned cases has been fully considered.

The appeal is denied substantially for the reasons set forth in the Summary Report attached to the Regional Director's letter of 4 June 1986. Contrary to your contention on appeal, the Board's decision in *Kroger Co.*, 219 NLRB 388 (1975), does fully support the conclusion that the Saturn Agreement is, as a matter of law, subject to the condition subsequent that the UAW must obtain majority support prior to actual recognition. Thus, it is

clear that this recognition, if contained in the GM-UAW National Agreement covering current bargaining unit employees, would not be unlawful. The mere fact that it is included in a separate Memorandum of Agreement between the UAW and Saturn, which clearly has single employer status with General Motors, cannot render it unlawful.

While you argue on appeal that the recent Board decision in *American Bakeries*, 280 NLRB No. 160 (1986), requires a different result, it was concluded that *American Bakeries* is factually distinguishable from the instant case. In *American Bakeries*, the employer not only entered into a collective bargaining agreement at a time when no employees had been hired, but it also applied the terms and conditions of that agreement, including an enforceable union security clause, to the employees who were subsequently hired even though there was no evidence presented to demonstrate that the union had attained majority status. Similarly, *Special Services Delivery, Inc.*, 259 NLRB 993 (1982), is distinguishable from the instant case in that the employer and the union in that case had no preexisting collective bargaining relationship at the time they executed the agreement in question. Not only do the Union and the Employer herein have a collective bargaining relationship of long-standing, the evidence indicates that the number of GM employees presently represented by the UAW who will transfer to the Saturn facility render it likely that the Union will be able to establish majority status at that plant.

Although we have concluded that the Saturn Agreement requires, as a matter of law, that the UAW establish majority status prior to actual recognition, under the facts of this case, we further concluded that such recog-

nition may be possible before a traditional representative complement of Saturn employees is hired. *Anaconda Co.*, 225 NLRB 953 (1976). However, it would be deciding issues not covered by the present charge to determine at this time when, in the lengthy period of time before a full complement will be reached, an appropriate initial group would be hired for such recognition.

Your contention that all employees will be required to become members of the UAW as a result of the Saturn Agreement is incorrect. The union security clause in the Saturn Agreement requires union membership only "to the extent permitted by law." Tennessee is a "right-to-work" state, and neither the union security provision nor the decision reached herein does anything to abrogate Tennessee law. Moreover, contrary to your contention on appeal, General Motors has not granted hiring preferences at the Saturn facility on the basis of UAW membership; rather, these preferences have been extended to GM employees who are represented by the UAW regardless of their individual status vis-a-vis the Union. An Employer does not violate the law when it prefers its own employees for transfer as long as that preference is based on employment status and not on union membership. While you allege that the UAW is operating a hiring hall for the Saturn plant, the situation presented in the instant case is not analogous to a hiring hall. Rather, the UAW has merely negotiated initial transfer rights for bargaining unit employees whom it presently represents. There can be no doubt that as the exclusive bargaining representative of these employees, the UAW is authorized to negotiate for them on the subject of their transfer rights particularly where, as here, the Employer's creation of job opportunities elsewhere may adversely impact their current employment status.

In addition, you rely on *N.L.R.B. v. Cabot Carbon*, 360 U.S. 203 (1959), to argue that the National Labor Relations Act requires only that an employer "deal with" a labor organization to establish a Section 8(a)(2) violation. The issue before the Supreme Court in *Cabot Carbon* was whether certain employee committees were labor organizations within the meaning of Section 2(5) and it was clear that if they were found to be labor organizations, the employer had violated Section 8(a)(2) of the Act inasmuch as the employer had both established and financed the committees. While there is no question that the UAW is a labor organization which has "dealt with" General Motors regarding the Saturn plant, it has done so on behalf of those employees for whom it has legitimate status as exclusive bargaining representative under Section 9(a) and there is no comparable impermissible employer involvement with the UAW in the instant case.

Finally, while you contend in your submission of 3 November 1986 that recent statements attributed to a Vice President of Saturn establish that a functioning collective bargaining relationship exists between Saturn and the UAW and that such statements reflect that the Employer has taken inconsistent positions before this Agency, neither contention is established by the referenced Employer statements. Thus, the wage rates referred to in those statements merely reflect the amounts found in the Saturn Agreement itself, which were in no way concealed by the Employer and which were well known prior to the earlier determination not to issue complaint. That fact in no way undermines our determination that the creation of a functioning bargaining relationship is dependent upon, as a matter of law, the achievement of majority support by the Union.

Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,

Rosemary M. Collyer
General Counsel

By /s/ Mary M. Shanklin
Mary M. Shanklin
Director, Office of Appeals

cc: Director, Region 7
John S. Irving, Esq., 655 15th Street, N.W., Washington, D.C. 20005
Leonard R. Page, Esq., Int'l Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214
Alice M. Osburn, Esq., General Motors Corp., 3044 West Grand Blvd., Detroit, Michigan 48202
Edmond J. Dilworth, Jr., Esq., Saturn Corp., 1400 Stephenson Hwy., Troy, Michigan 48007-7025
Rex H. Reed, 8001 Braddock Road, Suite 600, Springfield, Virginia 22160

APPENDIX D

NLRB Advice Memorandum on UAW-GM Saturn Agreement

June 2, 1986

GENERAL MOTORS CORP., SATURN CORP
NLRB Advice Memorandum

Case Nos. 7-CA-24872 and 7-CB-6582
June 2, 1986

These cases were submitted for advice as to: (1) whether the charges are barred by Section 10(b); (2) whether General Motors Corp. (GM) and the United Auto Workers (UAW) could lawfully negotiate an agreement granting preference for employment at GM's new Saturn facility to current and laid-off GM employees; and (3) whether GM could lawfully extend, and the UAW lawfully accept, recognition at the Saturn facility, prior to the time any employees are actually transferred and/or hired.

FACTS

On November 9, 1983, GM announced its Project Saturn. Later that year, GM issued a joint press release with the UAW announcing "plans for a Joint Study Center aimed at achieving an unprecedented union-management partnership in the development and manufacture of a small car." In January, 1984, the monthly issue of "GM Today" announced "General Motors' plan to domestically build a new subcompact car [that would] include full employe participation and enhanced job security under terms of a partnership between the corporation and the United Auto Workers (UAW)." On September 21, 1984, GM and the UAW reached agreement on a national contract (National Agreement) which included the development of a JOBS (Job Opportunity Bank-Security) program to protect employees from layoff as a result of the introduction of technology and out-

sourcing, and which contained Document No. 10 on Job Security. That document made specific reference to the Saturn project as one of GM's efforts "to remain a viable domestic enterprise."

On January 8, 1985,[1] the GM Board of Directors approved the formation of the Saturn Corporation as a wholly-owned subsidiary of GM to assume the obligations and goals of Project Saturn.[2] On February 20, Saturn Corp. was incorporated. On July 23, Saturn Corp. entered into a Memorandum of Agreement (the Saturn Agreement) with the UAW setting forth certain of the terms and conditions of employment at the future Saturn facility. The Saturn Agreement contains a recognition clause which provides *inter alia*:

> The success of Saturn is fully dependent on its people. Hiring and retention of experienced, dedicated personnel is essential. It is recognized that the best source of such trained automotive workers is found in the existing GM-UAW workforce. Therefore, to insure a fully qualified workforce, a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units throughout the United States.
>
> During the period of organization and start-up, certain particular skilled personnel will be required, including operating technicians and skilled technicians, virtually all of whom will come from UAW-represented units; therefore, the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex.

[1] All dates hereinafter are in 1985, unless otherwise noted.

[2] Although Saturn is a separate corporation, it is clear and uncontested that GM and Saturn constitute a single employer.

The Saturn Agreement sets forth a wage scale, holidays, vacation, and working hours, and provides for job security dependent upon an employee's length of employment (including seniority accumulated at other GM-UAW units). The Agreement requires union membership "to the extent permitted by law." The Agreement contains neither an effective date nor a termination date.

On July 29, GM announced the decision to construct the Saturn facility in Spring Hill, Tennessee. The projected ultimate workforce, to be reached 3 to 3½ years after the plant opens, is 6,000. The "full initial complement," to be reached approximately two years after the plant opens, is projected to be one shift of 2,500 employees. It is anticipated that a start-up workforce of 200 will be hired in the near future.

ACTION

We concluded that the charges in the instant cases are not barred by Section 10(b). We further concluded, however, that the charges should be dismissed, absent withdrawal.

A. *Section 10(b)*

In *United States Postal Service Marina Center*, 271 NLRB 397, 400 (1984), the Board concluded that the Section 10(b) period begins to run when there is "unequivocal notice" of a decision alleged to be an unfair labor practice, rather than the date on which that decision is implemented. Hence, the 10(b) issue in this case turns on when there was "unequivocal notice" of the decision to grant "preferential hire" rights and recognition to the UAW.

In our view, it was not until July 23 that there was "unequivocal notice" that GM would grant an employ-

ment preference to employees represented by the UAW and would grant recognition to the UAW. The UAW's argument concerning Section 10(b) relies on the 1983 GM-UAW press releases concerning Project Saturn. However, these releases do not say anything about hiring practices and recognition. The UAW also relies on the UAW-GM Report published in September 1984 describing the terms of the new National Agreement. This Report contained an article concerning a $100 million New Venture Fund established by the National Agreement as a joint effort by GM and the UAW to develop new business ventures and to provide employment opportunities for UAW-represented employees of GM. The Report also said that "to the extent permitted by law, the corporation [would] recognize the UAW" at such business ventures. The Saturn Project was not expressly discussed in this context, although, as noted, it was mentioned in Document No. 10 of the National Agreement concerning job security. Assuming arguendo that these documents reasonably implied that preferential hire and recognition would be accorded at Saturn, it is clear that these documents were distributed only to the UAW membership and GM personnel. There is no suggestion that they were generally available to the public. Consequently, the Charging Party in the instant cases, who has no connection with either the UAW or GM, could not be charged with knowledge of these documents.

In sum, the Charging Party was not clearly aware of any agreements regarding preferential hire and recognition until the Saturn Agreement announcement of July 1985. Accordingly, the August 7 charges were filed within the Section 10(b) period.

B. *The Obligation to Bargain.*

Before discussing the precise issues in the instant case, it is appropriate to note, by way of background, that GM and the UAW have had a long and productive collective bargaining relationship. In any collective bargaining relationship, there is an obligation to bargain over the effects of a decision that could have a significant adverse impact on the unit employees. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981); *Otis Elevator Company*, 269 NLRB 891 (1984).[3] Typically, the duty to bargain concerning "effects" arises in a situation where an employer's decision will result in a loss of jobs. Thus, for example, when an employer decides to relocate, it is obligated, at the very least, to bargain about the possibility of employee transfers to the new operation, including the possibility of preferential hiring rights there. See, e.g., *Fraser & Johnston Co.*, 189 NLRB 142, 143, 151 (1971), enfd. 469 F.2d 1259, 1262-63 (9th Cir. 1972); *Cooper Thermometer Co.*, 160 NLRB 1902, 1912 (1966), enfd. 376 F.2d 684, 687-88 (2d Cir. 1967).

This duty is not limited to relocations. Indeed, any management action which could result in layoffs will require bargaining over the "effects" of the decision, even if the decision itself does not require bargaining.[4] Both GM and the UAW have long recognized their obligations to bargain about the impact of management decisions on unit employees. Their current contract contains many of

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[3] See also *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 and cases cited therein (9th Cir. 1967); *Royal Typewriter Co.*, 209 NLRB 1006, 1015 n. 21 (1974), enfd. 533 F.2d 1030 (8th Cir. 1976); *General Cinema Corp.*, 214 NLRB 1074, 1076 n. 12 (1974).

[4] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

the fruits of this collective bargaining. One provision gives an employment preference to laid-off GM employees for 24 months after production in a new plant begins (¶95); another provision acknowledges transfer rights with full seniority, even for permanently laid off employees, in situations where GM transfers major operations between plants (¶96, Document No. 28); and a Memorandum of Understanding sets up a Job Opportunity Bank Security Program (JOBS Program) (Document No. 10, Appendix K). The fundamental promise of the JOBS program is that no GM employee represented by the UAW with one or more years of seniority will be laid off as a result of the introduction of technology, outsourcing, or negotiated productivity improvements. The JOBS Program is designed to place, and re-train if necessary, any GM-UAW unit employee who is displaced. In addition, the JOBS Program obligates GM to continue paying eligible employees who have minimum levels of seniority and who have been laid off as a result of certain changes in operation. These provisions represent a clear commitment by GM, through bargaining with the UAW, to avoid job loss in the event of changes in the operation of the enterprise. There is no allegation that any of these commitments is illegal.

C. *Issues Raised by the Instant Charges.*

1. *Job Preference*

Technically the charges in the instant cases allege only that the recognition is premature and therefore unlawful. However, the validity of the decision regarding recognition turns to some extent upon the validity of the agreement to give preferential hiring rights to current GM employees who are represented by the UAW. In addition, the Charging Party has made it clear that it is

attacking the preferential hiring agreement because it allegedly discriminates against employees who are not employed now by GM in units represented by the UAW. In the Charging Party's view, this preference unlawfully encourages membership in the UAW.

We have concluded that the preferential hire agreement is the product of legally required "effects" bargaining over an employer decision which has potential adverse consequences for unit employees, and that it does not discriminate unlawfully against employees. As discussed above, the case law requires that an employer bargain about the effects of a management decision that could affect the jobs of unit employees. Further, as discussed above, where the management decision involves the construction of a new facility, the bargaining will often involve the granting of preferential hiring rights at that new facility. It is clear that the agreement granting preferential hire rights at the Saturn facility to present and laid-off GM employees in units represented by the UAW was a legitimate product of such "effects" bargaining. See *Metropolitan Teletronics Corp.*, 279 NLRB No. 134, slip op. at p. 9 (1986).

In the instant case, GM made a decision to construct a new facility. Clearly that decision can have a major impact on current unit employees. According to GM, the Saturn project is the prototype for the future of General Motors and, possibly, the prototype for the future of the small car manufacturing industry in America. If the Saturn project succeeds, there is at least a reasonable likelihood that GM's other small car facilities will be closed or reduced; some may be converted to similar, Saturn-type facilities. Alternatively, if the Saturn project fails, there is a distinct possibility that GM will close its small car manufacturing facilities in the U.S. and move this manufacturing arm abroad. Under either scenario, there is

the potential for significant job loss for UAW-represented employees. Both GM and the UAW recognized that the Saturn Project represented a management decision concerning the future of the company, and that this decision could adversely and directly affect unit employees. Accordingly, it was clear that the National Labor Relations Act obligated the parties to bargain about the effects of that decision and about granting preferential hiring rights at the new facility. In accordance with the law, and with GM's commitments, the parties have bargained and reached an agreement. Thus, that agreement is the lawful product of required bargaining.

We recognize that the preference given to GM employees represented by the UAW may have some negative impact on the employment prospects of others. However, this fact does not render this employment preference unlawful. In situations where a union obtains a benefit for employees it represents, that gain may encourage other employees to join the union. The Supreme Court has held that this is not the kind of encouragement which the Act prohibits. *Local 357 Teamsters v. NLRB*, 365 U.S. 667, 675-76 (1961); *Radio Officers Union v. NLRB*, 347 U.S. 17, 42-43 (1954). The Charging Party further argues that GM has discriminated against those who are not members of the UAW. However, the evidence does not establish such discrimination. If an employee is in a unit of employees represented by the UAW, that employee obtains the preference, irrespective of whether he/she is actually a member of the Union.[5] Conversely, if an em-

[5] There are a number of UAW-represented GM plants in right-to-work states. Further, even in the other states, full membership cannot be required as a condition of employment. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Thus, an employee can be represented by the UAW and eligible for the benefits of the Saturn Agreement and yet not be a member of the UAW.

ployee is a UAW member, and yet not in a represented unit, he/she would not receive the benefit.

Further, even though GM's conduct does distinguish between employees based on whether they have worked for GM in a unit represented by the UAW that does not necessarily make it unlawful. Although GM employees represented by UAW are given a preference, they need not become or remain members of UAW to work at Saturn. By its very terms, the Saturn Agreement's union security clause is enforceable only to the extent permitted by law. Tennessee is a right-to-work state, and thus union security *cannot be enforced* there. There is no evidence whatsoever that GM or the UAW intend to flout state laws. To the contrary, these parties have conformed their practice to such requirements. In this regard, we note that the GM-UAW National Agreement, which contains an identical union security clause, covers employees in many states, some of which are right-to-work states. There is no evidence suggesting that the parties have attempted to apply the clause in right-to-work states. Finally, it is not a foregone conclusion that employees will be actually represented by the UAW at the Saturn plant. As discussed infra, if the UAW does not obtain the free support of a majority of Saturn unit employees, the UAW will not be their collective bargaining representative.

It is also clear that the Employer has a legitimate and substantial business justification for its conduct.[6] That is, GM has a need for a ready supply of skilled employees to assure the success of this costly new undertaking, and its current production employees, almost all of whom are represented by the UAW, can best fill that need. Finally,

[6] See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

and with particular respect to legitimacy, the Employer's conduct was a consequence of lawful, required bargaining about "effects".

The instant case is clearly different from other cases where a hiring preference has been condemned. See, e.g., *IATSE Local 659 (MPO-TV of California)*, 197 NLRB 1187, 1189 (1972), enfd. 477 F.2d 450 (D.C. Cir. 1973), cert. denied 414 U.S. 1159 (1974); *New York Typographical Union No. 6 (Royal Composing Room)*, 242 NLRB 378, 379 (1979), enf. denied 632 F.2d 171 (2d. Cir. 1980). In those cases, the contracts provided that, in referring applicants for employment pursuant to an exclusive hiring hall agreement, the unions would give preference to employees having prior work experience with employers signatory to the contracts. Those signatories included members of the multiemployer bargaining unit as well as "me-too" signers that did not belong to the unit. The Board concluded that, to the extent the referral preference turned on experience gained by working for a "me-too" signer outside the unit, it was unlawful because it thereby rewarded employees who chose to work in union-represented units and penalized those who did not. Notably, the preference was not invalidated insofar as it covered actual members of the multiemployer bargaining unit.

In the instant case, GM is granting a preference to its own employees. Employees are being transferred from one GM facility to another; they are not being newly hired. The preference they receive is based on their status as GM employees; it is not, as in the cases cited, based on experience with a wholly unrelated company merely because that company is signatory to a union contract. Stated simply, the Board cases do not prohibit an em-

ployer from preferring its own employees over "the rest of the world."[7]

Concededly, GM did not grant the preference to all of its employees. However, the great majority of the other GM employees do not have the generalized production skills needed at Saturn. Most of these employees manufacture such auxiliary components as batteries and rubber hoses or perform no production work at all.

Admittedly, there are some non-UAW-represented employees who may have the generalized production skills needed at Saturn. Assuming arguendo that these employees have skills comparable to employees represented by the UAW, there is nothing presented by the Charging Party in this case or by the investigation of this case to show that GM unlawfully favored the UAW over the unions that represent these other employees. As shown, GM bargained and reached an accord with the UAW. There is nothing to suggest that GM violated its bargaining obligation to the other unions.[8]

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[7] See *Courier-Citizen Co. v. Local 11*, 702 F.2d 273, 276 n. 4, 277-78 (1st Cir. 1983) (the court relied on similar reasoning to uphold an arbitration award enforcing a preferential hiring agreement between bargaining units of a single employer; the court rejected the contention that the preference illegally discriminated on the basis of union affiliation, noting that although it limited the pool of jobs and benefits available to others, "it is not clear that granting this sort of priority to jobs in the same company is unreasonable or inconsistent with sound labor policy").

[8] On May 12, 1986, the Pattern Makers League (PML) filed a charge against Saturn in Case 7-CA-25819. That charge is now under investigation. Thus, at this juncture, we do not know whether Saturn/GM unlawfully refused to bargain about, and/or unlawfully refused to grant, preferential hiring rights at Spring Hill for GM employees represented by PML. It may turn out, for example, that PML waived its rights to bargain (see *International Harvester*, 209 NLRB 357 (1974)), or that

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Based on the above, we concluded that GM did not violate the Act by according preferential hiring rights at Saturn to its own employees who are represented by the UAW.

2. *Premature Recognition*

The Charging Party argues that GM recognized the UAW at an inappropriate time, i.e., before any employees were hired at Saturn. We conclude that, in the current circumstances, the argument has no merit.

In *Kroger Co.*, 219 NLRB 388 (1978), the Board held that an employer could agree to grant recognition to a union at a future facility. In upholding this agreement, the Board said that it would assume the parties intended their agreement to be lawful and that it would read into the recognition agreement the condition that the union must in fact obtain majority status at the new facility. In the instant case, GM agreed to grant recognition to the UAW at Saturn, a future facility. Concededly, as in *Kroger*, there is nothing in the Saturn Agreement that expressly conditions recognition upon the UAW's attainment of majority status at Saturn.[9] As noted supra, how-

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GM Saturn had legitimate business reasons for not according preferential hiring rights to PML. Further, even assuming arguendo that we would find PML's charge to be wholly meritorious, that finding would not invalidate GM's agreement with UAW. Rather, such a finding would simply mean that, in our view, GM Saturn must enter into "effects" bargaining with PML and must treat with PML in a nondiscriminatory way. Such bargaining could be meaningful, for, as noted supra, the Saturn Agreement does not grant all Saturn jobs to GM employees represented by the UAW.

[9] The agreement merely contains the prediction that the UAW will achieve majority status. Of necessity, there is no way that GM and the UAW can presently guarantee that the prediction will come to pass, inasmuch as this is dependent upon matters outside of the control of GM

(continued)

ever, the Board will read into the agreement the condition that the UAW must achieve majority status. Hence, the Saturn Agreement is, in law, an agreement to recognize the UAW at Saturn, in future, if and when the UAW achieves majority support there. As construed by *Kroger*, the agreement is lawful.[10]

The fact that the Saturn Agreement is not a contract bar[11] lends further support to this view. That is, the employees to be hired at Saturn can freely choose to be unrepresented or to be represented by some other union. Since the Agreement has no fixed term, such employees could petition to decertify the UAW or to select another union.

The current evidence is insufficient to establish that GM and UAW have acted at variance with the *Kroger* principles noted supra, i.e. that they have entered into a functioning collective bargaining relationship before any employees have begun working at Spring Hill. Thus, we need not pass on the issue of whether GM and UAW could do so.

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or the UAW, viz. (1) that UAW-represented employees will seek employment in sufficient numbers to constitute a majority of the Saturn workforce; and (2) that these employees will continue, at Saturn, to desire UAW representation.

[10] This is not to say that GM must withhold actual recognition until majority status is achieved *among a representative complement of employees*. To the contrary, if and when UAW obtains majority status among the employees initially hired at Saturn, GM could lawfully recognize the UAW. Such recognition would not automatically preclude a Board election. See *Anaconda Co.*, 225 NLRB 453 (1976). See also *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958).

[11] A contract, like the Saturn Agreement, with no fixed term is not considered a bar to any representation petition. *Pacific Coast Association of Pulp and Paper*, 121 NLRB 990, 993 (1958).

That issue is not free from doubt. On the one hand, the recent case of *Harte & Co.*, 278 NLRB No. 128 (1986) may suggest that GM and UAW could enter into a collective bargaining relationship now. In that case, an employer had a collective bargaining relationship with a union at one facility. When it decided to move and open a new facility, it recognized the union there. *Significantly, the recognition occurred prior to the time when employees were hired and prior to the union's acquiring majority status.* Indeed, the union never achieved majority status at the new plant. The Board nonetheless found that the recognition was lawful. In doing so, the Board noted that when the move was substantially completed the new workforce consisted of a substantial number of employees from the old plant. The Board further noted the good faith of the parties, the reasonableness of their actions, and considerations of national labor policy. With respect to the last factor, the Board noted that the agreement was achieved through good faith bargaining. The Board said that "national labor policy favors industrial stability achieved through the collective bargaining process." The Board further stated that the "parties responded admirably to a difficult situation with recognition of the economic realities involved. To say they acted illegally . . . would work a manifest injustice." Similarly, in the instant case, the parties engaged in good faith collective bargaining and responded, through collective bargaining, to a difficult situation posed by the "economic realities" of foreign competition.

Prehire recognition has also been approved in *NLRB v. Burns*, 406 U.S. 272, 294-295 (1972). Where a new employer takes over a unionized business and it is "perfectly clear" that the new employer "plans to retain" all

or a sufficient number of the predecessor employees so that they will constitute a majority of the new employer's workforce, the new employer is privileged, and indeed obligated, to recognize the union as soon as it is apparent that the union will represent the workforce. This obligation arises whenever the intent to hire the predecessor employees becomes "perfectly clear," not necessarily only when there is actual hiring. Thus, it can arise *before* the workforce is hired.

In the instant case, it is "perfectly clear" that GM "plans," and has agreed, to give a hiring preference to employees now in GM-UAW units, and there is a strong likelihood that these employees will constitute a majority of the employees at the new facility. In this regard, we note that the Employer has agreed to extend offers of employment so that a majority of the Saturn workforce will come from the ranks of its own employees who are now represented by the UAW. Second, it is highly likely that a sufficient number of UAW-represented employees will accept employment so as to constitute a majority of the workforce. GM presently has over 420,000 UAW-represented employees eligible to apply at Saturn, plus approximately 20,000 UAW-represented employees on layoff status who also may be qualified for Saturn jobs. The initial terms and conditions of employment specified in the Saturn Agreement are presumably favorable to such employees in that they preserve certain existing pension rights, and provide comparable wages with opportunities for productivity bonuses. Moreover, Saturn is apparently viewed by many GM employees as an experimental venture that could possibly be "the wave of the future" for the automobile industry and, consequently, worth getting into "on the ground floor." A

GM-commissioned poll of a representative sample of skilled and operating technicians at two present GM facilities represented by the UAW revealed that from 114,000 to 145,250 Generai Motors skilled and unskilled workers would be willing to consider working for Saturn Corporation in Spring Hill, Tennessee. The UAW also indicates that it has received at least 500 unsolicited letters of interest from its members indicating their desire to transfer to Spring Hill. In these circumstances, the reasoning of *Burns* may permit GM to recognize the UAW at this time.

On the other hand, it can be argued that both *Harte* and *Burns* are distinguishable. The *Harte* case involved a relocation of an existing facility, and the new facility operated substantially the same as the old one. In the instant case, automobiles at the new facility will not be manufactured in the same way as they are at existing facilities. Similarly, in *Burns*, the new employer purchased a facility and operated it in the same manner and at the same place. The instant case involves a new and different operation and a new and different location.

As noted, we need not decide at this time whether the differences in *Harte* and *Burns* would call for a different result in the instant case if GM and UAW entered into a functioning collective bargaining relationship before UAW achieves majority status among employees working at Saturn. If they did so, a new charge could present that issue.[12]

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[12] The PML charge discussed supra apparently contains an allegation that GM has granted exclusive recognition at Spring Hill to UAW, and thus declined to recognize PML there. As noted, the investigation of the instant charge does not support the allegation that GM is now recognizing UAW. If the investigation of the PML charge supports that allegation, we would be presented with the issue noted above.

In light of all of the above, the instant charges should be dismissed, absent withdrawal.

by Harold J. Datz, *Associate General Counsel*
Division of Advice

APPENDIX E

NLRB General Counsel Memorandum on Drug and Alcohol Testing

September 8, 1987

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 87-5 8 September 1987

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Guideline Memorandum Concerning Drug or Alcohol Testing of Employees

In the year since I issued General Counsel Memorandum 86-6 (26 June 1986), directing that all cases involving drug or alcohol testing be submitted to the Division of Advice, major issues presented by such cases have been addressed and resolved administratively.[1] This guideline memorandum sets forth my position on those issues, and is intended to assist the Regional Offices in the disposition of pending and future cases involving drug testing.[2]

In brief, it is my position that: 1) drug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the Act; 2) in general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and even if established work rules preclude the use or posses-

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[1] Such mandatory submissions are no longer required. See General Counsel Memorandum 87-4 (2 July 1987).

[2] The principles concerning "drug testing", as set forth herein, apply equally to alcohol testing programs. Hence, the term "drug testing", as used herein, refers to both.

sion of drugs in the plant; 3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing; 4) normal Board deferral policies under *Dubo* and *Collyer*[3] will apply to these cases; however, if Section 10(j) relief is otherwise warranted, deferral will not be appropriate.

We anticipate that this memorandum will provide sufficient guidance for the Regions to resolve the merits of most, if not all, of their pending or future drug testing cases. Accordingly, with the limited exceptions noted below, future submission of the merits of these cases to Washington will be at the discretion of the Regional Director.

I. *Drug Testing as a Section 8(d) Subject of Bargaining*

A. *Current Unit Employees*

As noted above, we have concluded that drug testing of current unit employees is a mandatory subject of bargaining within the meaning of Section 8(d) of the Act. Generally, an employment requirement is a mandatory subject of bargaining under the Act if it is "germane to the 'working environment'" of the employees and if its establishment "is not among those 'managerial decisions [ ] which lie at the core of entrepreneurial control.'"[4] We conclude that drug testing meets this critical test.

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[3] *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1971). See also *United Technologies Corp.*, 268 NLRB 557 (1984).

[4] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting from *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222-23 (1964) (Stewart, J., concurring). Compare *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (employer decision to close part of its business for economic reasons is entrepreneurial and not a mandatory subject of bargaining).

In response to a growing national concern over drug abuse and drugs in the workplace, some employers have decided to implement drug tests for their employees. In many drug testing programs, employees who refuse to submit to a test may be subject to discipline, including discharge, while employees who submit to the test and have positive results may be suspended and/or required to participate in rehabilitation programs, forced to accept a change in job duties, or subjected to discipline up to and including discharge. Thus, mandatory drug testing literally is a "condition of employment." It is a "fitness-for-duty" type requirement that may ultimately affect employment status. In our view, any such obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employees' working conditions and, therefore, are presumptively mandatory subjects of bargaining within the ambit of Section 8(d) of the Act. In addition to the "fitness-for-duty" implications of testing, the test procedures, including the methods for assuring the security of the test samples and the accuracy of the test, are matters of vital concern to employees and their representatives.

In analogous cases, the Board has found that physical examinations,[5] polygraph testing,[6] and safety rules[7] are

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Lockheed Shipbuilding Co., 273 NLRB 171, 177 (1984); *LeRoy Machine Co.*, 147 NLRB 1431, 1432 (1964).

Medicenter, Mid-South Hospital, 221 NLRB 670, 675 (1975). The Board majority in *Medicenter*, adopting the ALJ's analysis, noted that "the mandatory across-the-board use of a controversial mechanical device for testing . . . employees . . . [gave] rise to a number of salient considerations and questions (apart from the severity of the punishment for refusing to submit to it) which suggest the 'amenability of such subjects to the collective bargaining process.'" 221 NLRB at 676 (citing *Fibreboard*, 379 U.S. at 211, footnote omitted).

Gulf Power Co., 156 NLRB 622, 625 (1966), enfd. 384 F.2d 822, 825

(continued)

mandatory subjects of bargaining. Indeed, with respect to physical examinations and polygraphs, the bargaining obligation extends not only to whether there will be a "testing" requirement but also, if so, to the particulars of any such testing. Thus, an employer is also obligated to bargain over the content of a physical examination, the purpose for which the examination is to be used, and how test results, or the refusal to submit to a test, will affect employment.[8] And respecting polygraph tests, the Board has held that "[t]he required bargaining . . . does not comprehend merely the magnitude or propriety of the penalty, but, as well, the content and incidents of the rule giving rise to the penalty."[9] As physical examinations and polygraph tests are analogous to drug testing, we believe the scope of the bargaining obligation regarding the latter is as extensive as that respecting the former.

We do not believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from Section 8(d) of the Act. In *Gulf Power Co.*, ante n. 7, the Board considered and flatly rejected

(5th Cir. 1967); *Boland Marine & Mfg. Co.*, 225 NLRB 824, 829 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977). Cf. *Womac Industries, Inc.*, 238 NLRB 43 (1978) (absenteeism).

[8] See *Lockheed Shipbuilding*, 273 NLRB at 171, 177; *LeRoy Machine Co.*, 147 NLRB at 1432, 1438-39.

[9] *Medicenter*, 221 NLRB at 677-78. The Board majority also adopted the Administrative Law Judge's delineation of other salient questions, such as "the validity and integrity of the testing procedure; the breadth of the test questions; the qualifications of the persons who devise and administer the test; the weight to be attached to 'failing' the test, and the consequences of failure; and the right of union representatives or friends to be present during the administration of a potentially frightening procedure alien to the experience of most employees." Id., at 676 n. 23.

this argument with respect to safety regulations. In enforcing the Board's order in that case, the Fifth Circuit concluded that "the Company's contention that . . . safety was a prerogative of management was without merit." 384 F.2d at 825. Even more to the point, the Board majority in *Medicenter*, ante, n. 6, rejected the employer's argument that instituting a polygraph test fell within its inherent right to conduct its business. To the contrary, the Board concluded,

> [t]he institution of a polygraph test is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and does not impinge only indirectly upon employment security. It is, rather, a change in an important facet of the workaday life of employees, a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary "core of entrepreneurial control." 221 NLRB at 676.

Similarly, drug testing is not a prerogative of management exempt from Section 8(d).[10]

B. *Employee Applicants*

The issue of whether drug testing of applicants for employment is also a mandatory subject of bargaining is more difficult. However, since the issue is an important one and since a reasonable argument can be made that the subject is mandatory, I have authorized complaints on this issue in order to place the question before the Board. Arguably, a pre-hire drug test not only estab-

[10] See also *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 620 F. Supp. 163, 169 (D. Mont. 1985), appeal pending No. 85-4138 (9th Cir.) (employee drug testing under Railway Labor Act not entrepreneurial).

lishes a condition precedent to employment for job applicants, it also settles a term and condition of employment of current employees by vitally affecting their working environment.[11]

Regarding the first point, the Board has held that conditions of becoming employed can constitute a mandatory subject. With court affirmance, the Board held that both the agreement to use, and the internal operation of, a hiring hall are mandatory subjects of bargaining. *Houston Chapter, Associated General Contractors*, 143 NLRB 409, 413 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966) (agreement to utilize hiring hall). *Pattern Makers' Assn. of Detroit (Michigan Pattern Mfrs. Assn.)*, 233 NLRB 430, 435-36 (1977), enfd. on this point 622 F.2d 267 (6th Cir. 1980) (internal operational processes of hiring hall). The Board in *Houston Chapter, A.G.C.*, 143 NLRB at 412, said that "[i]t can scarcely be denied, since 'employment' connotes the initial act of employing as well as the consequent state of being employed, that the hiring hall relates to the conditions of employment." Most significantly, the Board's 1984 decision in *Lockheed Shipbuilding*, ante, n. 5, 273 NLRB at 171, specifically dealt with the applicant issue and held that an employer violated Section 8(a)(5) of the Act by unilaterally implementing new medical screening tests "for the purpose of *denying employment to new employees*" (emphasis added).

[11] The Supreme Court has held that a proposal may be a mandatory subject of bargaining even though it relates to parties outside the bargaining unit if it "vitally affects the 'terms and conditions' of . . . employment" of bargaining unit employees. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971).

As to the second point, the Board has held that information regarding the race and sex of applicants is presumptively relevant to a union's performance of its representative duties toward current employees, because "'an employer's hiring practices inherently affect terms and conditions of employment.'" *White Farm Equipment Co.*, 242 NLRB 1373, 1375 (1979), enfd. per curiam 650 F.2d 334 (D.C. Cir. 1980), citing *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1404 (1964), enforcement denied on other grounds 419 F.2d 216 (9th Cir. 1969). Based on these cases, we have argued that, just as existing unit employees have a legitimate interest in working in a racially and sexually integrated workplace, so too do they have a legitimate interest in the issue of whether steps should be taken to screen out drug users from employment, and what those steps should be.

II. *Drug Testing As A Substantial Change In Working Conditions.*

In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant *uses* drugs, irrespective of whether such usage interferes with ability to perform the work. In addition, it is our

view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested[12] or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is "a material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally."[13]

There can be no quarrel with an employer's desire to ensure a drug-free work force or a drug-free working environment. We simply conclude that, upon request, an employer must bargain in good faith with its employees' Section 9(a) representative about a decision to institute

[12] See, e.g., *IBEW Local 1900 v. PEPCO*, 121 LRRM 3071, 3072 (D.D.C. 1986) (TRO granted under Section 301 LMRA pending arbitration against extensive drug testing program involving "invasions of privacy which are almost unheard of in a free society. . ."). Cf. *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067, 1072 (1st Cir. 1986) (use of mandatory polygraph examination to investigate employee off-duty drug use found "highly offensive" and invasion of plaintiff's privacy).

[13] *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971). See also *Miller Brewing Co.*, 166 NLRB 831, 832 (1967), enfd. 408 F.2d 12, 15 (9th Cir. 1969) (employer obligated to bargain before changing work rules, even though changes allegedly mere codification of past practice, where new rules subject employees to different procedures or impose more serious penalties for their breach). Compare *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) (change from sign-in sheet to time clock not a substantial change in past practice).

drug testing and the content, procedures and effects of such a program. See generally *NLRB v. Katz*, 369 U.S. 736 (1962); *Womac Industries, Inc.*, ante, n. 7, 238 NLRB at 43. Thus, assuming that the issue is an open one for bargaining—e.g., during contract hiatus or during the term of a labor agreement if the agreement does not mention drug testing and if the parties never discussed the issue in contract negotiations[14]—the employer would be required to notify the union of its intention to initiate drug testing and, upon request, to bargain to an agreement or a good faith impasse before implementing any such program. The notice must be sufficient to provide the union a meaningful opportunity for bargaining.[15]

III. *Union Waiver of its Bargaining Rights*

Union waiver of the right to bargain over drug testing has emerged as an important issue in many of the cases

[14] See *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), enfd. 196 F.2d 680 (2d Cir. 1952). If a current labor contract already contains a specific clause dealing with drug testing that the employer wants to change mid-term, or if the subject was fully explored during contract negotiations or the contract has a "zipper clause," see *Jacobs Mfg. Co.*, 94 NLRB at 1220, n. 13, the union may have a right under Section 8(d) not to bargain over the subject during the term of the agreement. The employer would then be barred from implementing any proposal during the term of the contract even after notice to the union. See *C & S Industries, Inc.*, 158 NLRB 454 (1966); *St. Marys Hospital*, 260 NLRB 1237, 1245-46 (1982). Cf. *GTE Automatic Electric Inc.*, 261 NLRB 1491, 1492 n.3 (1982). Such 8(d) contract modification cases should be submitted to Advice.

[15] See, e.g., *J.P. Stevens & Co., Inc.*, 239 NLRB 738, 743 (1978), enfd. on this point 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981). Accord: *ILGWU v. NLRB (McLaughlin Mfg. Corp.)*, 463 F.2d 907, 919 (D.C. Cir. 1972). Moreover, regular Board policies concerning Section 10(b) and "hidden" violations will apply. See, e.g., *Uniglass Industries, A Division of United Merchants & Mfrs.*, 276 NLRB 345, 349 (1985), enfd. 123 LRRM 2591 (2d Cir. 1986); *Don Burgess Construction Corp.*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979); *Russell-Newman Mfg. Co.*, 167 NLRB 1112, 1115 (1967), enfd. 406 F.2d 1280 (5th Cir. 1969).

we have considered. We have concluded that regular Board policies regarding waiver should apply to drug testing cases. Thus, any waiver by the union of this statutory right to bargain, either by contract, past practice or by inaction, is not to be lightly inferred and must be "clear and unmistakable".[16]

A. *Waiver by Contract or Past Practice*

A waiver by contract may be found where the language of the agreement is specific, and/or the history of prior contract negotiations suggests that the subject was discussed and "consciously yielded".[17] Waiver will not be inferred from the contract's silence on the subject,[18] from a generally worded management prerogatives clause[19] or from a "zipper" clause.[20] Similarly, waiver by past practice must clearly encompass the program at issue.[21]

Applying the above principles, we have concluded that, in the absence of clear bargaining history to the

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[16] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). See generally *Owens-Corning Fiberglas Corp.*, 282 NLRB No. 85 (5 January 1987); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) and cases cited therein.

[17] See e.g., *Press Co., Inc.*, 121 NLRB 976, 977-78 (1958); *Proctor Mfg. Corp.*, 131 NLRB 1166, 1169-70 (1961); *NL Industries, Inc.*, 220 NLRB 41, 43-44 (1975), enfd. 536 F.2d 786 (8th Cir. 1976); *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 567-68 (1979).

[18] See, e.g., *Elizabethtown Water Co.*, 234 NLRB 318 (1978); *T.T.P. Corp.*, 190 NLRB 240, 244 (1971).

[19] See, e.g., *Ciba-Geigy Pharmaceuticals Division*, ante, n. 16, 264 NLRB at 1017; *Merillat Industries, Inc.*, 252 NLRB 784, 785 (1980).

[20] *Suffolk Child Development Center, Inc.*, 277 NLRB No. 158, JD slip op. at 11 (30 December 1985).

[21] Compare *Continental Telephone Co.*, 274 NLRB 1452, 1453 (1985) with *Beacon Piece Dyeing & Finishing Co., Inc.*, 121 NLRB 953, 956-959 (1958).

contrary, broad management rights clauses giving an employer the right "to issue, enforce, and change Company rules", or to "make and apply rules and regulations for production, discipline, efficiency and safety," or requiring employees to observe the employer's existing rules and regulations, do not, standing alone, constitute a waiver of the union's right to bargain over drug testing. Such clauses refer only to employer rules and regulations generally and do not refer clearly and specifically to drug testing. And, as previously observed, drug testing is not a "rule or regulation" but, rather, is a unique and distinctive means of enforcing rules regarding drug use.

For essentially the same reasons, we have concluded that a union's acquiesence [*sic*] in a past practice of requiring applicants and/or current employees to submit to physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing.[22] This would be true even where such past practices exist in conjunction with the kind of general, nonspecific management rights clauses discussed above.[23] Similarly acquiesence [*sic*] in drug testing "for cause" does not by itself waive a union's right to bargain over random drug testing because such expansion of an existing drug testing program constitutes "a material, substantial, and . . . significant change. . . ." *Murphy Diesel Co.*, supra, 184 NLRB at 763.

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[22] *Murphy Diesel Co.*, ante, n. 13, 184 NLRB at 763; *Owens-Corning Fiberglas*, ante, n. 16, 282 NLRB No. 85, slip op. at 3.

[23] *Murphy Diesel Co.*, supra; *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1016-1017; *Lockheed Shipbuilding Co.*, ante, n. 5, 273 NLRB at 177.

B. *Waiver by Union Inaction*

Where an employer gives a union advance notice of an intention to change a term or condition of employment, the union must make a reasonably timely request for bargaining over the matter to avoid a finding of waiver or acquiescence.[24] Further, the union must actually make it reasonably clear it desires to bargain; simply protesting the change may not be enough to preserve the right to bargaining.[25] However, the employer's notice must be sufficiently in advance of implementation to allow for bargaining and must be more than a mere announcement of a *fait accompli*.[26]

IV. *Remedies to be Sought From the Board*

As a remedy for an unlawful, unilateral implementation or modification of a drug testing program, the Regions should seek an order requiring the employer to revoke all aspects of the new policy and to bargain with the union to agreement or to a good faith impasse before again implementing a drug testing program.[27] In addi-

[24] See, e.g.,*Kansas National Education Assn.*, 275 NLRB 638, 639 (1985); *Citizens National Bank of Willmar*, 245 NLRB 389, 389-90 (1979), enfd. 106 LRRM 2816 (D.C. Cir. 1981); *Meharry Medical College*, 236 NLRB 1396 (1978). But see *Southern Newspapers, Inc., d/b/a The Baytown Sun*, 255 NLRB 154, 161 (1981); *Allen W. Bird II; Caravelle Boat Co.*, 227 NLRB 1355, 1358 (1977).

[25] See *American Buslines, Inc.*, 164 NLRB 1055, 1055-56 (1967).

[26] See, e.g., *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1018; *Intersystems Design & Technology Corp.*, 278 NLRB No. 111, slip op. at 2-4 (28 February 1986).

[27] If the violation entails a contract modification under Section 8(d), see n. 14, supra, then the remedy would include a prohibition on any implementation for the life of the current agreement without the union's consent. See *C & S Industries, Inc.*, ante, n. 14, 158 NLRB at 461.

tion, the Regions should seek reinstatement or rescission of discipline, with appropriate backpay, for any employees discharged or disciplined for refusing to submit to the drug test.[28] However, it is not clear that such a remedy would be appropriate for an employee disciplined or discharged for testing positive under a drug test.[29] The Regions should submit any cases involving the latter issue to the Division of Advice.

V. *Interplay Between Deferral to Arbitration and Section 10(j) Injunctive Relief*

The Regions should apply the established Board criteria in determining whether to defer cases under *Collyer* or *Dubo*. Thus, if a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective-bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case.[30] However, deferral to arbitration is discretionary under Section 10(a) of the Act.[31] Since issuance

[28] See *Murphy Diesel Co.*, 184 NLRB at 765; *Boland Marine & Mfg. Co.*, ante, n. 7, 225 NLRB at 824-25; *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1019; *Alfred M. Lewis, Inc. v. NLRB*, 587 F. 2d 403, 412 (9th Cir. 1978).

[29] See *Taracorp, Inc.*, 273 NLRB 221, 222-24 (1984).

[30] See *Arbitration Deferral Policy Under Collyer-Revised Guidelines*, released 10 May 1973 and GC Memorandum 84-5, "Guideline Memorandum concerning *United Technologies Corp.*, 268 NLRB No. 83," dated 6 March 1984. Thus, for example, deferral would not be appropriate where the employer is unwilling to waive time limits on the filing and processing of a grievance relating to the implementation of the disputed program. See *The Detroit Edison Co.*, 206 NLRB 898 (1973). Deferral is an affirmative defense that must be timely raised by the charged party. Cf. *Alameda County Assn.*, 255 NLRB 603, 605 (1981).

[31] See *Collyer Insulated Wire*, 192 NLRB at 840. See also *Lectromelt Casting & Machinery Co.*, 269 NLRB 933, 934 (1984); *NLRB v. Walt Disney Productions*, 146 F.2d 44, 48 (9th Cir. 1945), cert. denied 324 U.S. 877 (1945).

of a complaint[4] is a jurisdictional prerequisite to Section 10(j) injunctive relief, deferral would be inappropriate if Section 10(j) injunctive proceedings are otherwise warranted. Hence, the Section 10(j) issue, if raised, must be considered in deciding whether to defer to the parties' arbitration procedures.

A Section 10(j) order enjoining an employer from subjecting current unit employees to an unlawful, unilaterally implemented drug testing program may be warranted where such implementation is demonstrably undermining the union's ability to function effectively as the employees' bargaining representative.[32] Accordingly, to evaluate the need for Section 10(j) relief, the Regions should inquire into any actual effect of an unlawfully implemented drug testing program on the union's representational capacity.

Section 10(j) relief may also be indicated where implementation of a drug testing program is unlawfully motivated[33] or a program is unlawfully, discriminatorily applied—for example, to union officers or other officials involved in grievance adjustments.[34]

Even in cases where there is no evidence of discriminatory motivation or other irremediable adverse impact on the union, Section 10(j) proceedings may be warranted if a Board order in due course will be unable to undo or provide an effective remedy for employees' compelled

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[32] See, e.g., *Morio v. North American Soccer League*, 632 F.2d 217 (2d Cir. 1980).

[33] Cf. *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935 (9th Cir. 15 June 1987).

[34] Cf. *Gottfried v. Samuel Frankel*, 818 F.2d 485 (6th Cir. 1 May 1987).

submission to unlawful drug testing. Thus, injunctive relief could be appropriate if an employer were to unlawfully implement a highly invasive, random or universal drug testing program under which all or a substantial number of the employer's current employees would be imminently affected.[35]

If the Charging Party has not requested Section 10(j) relief, and the Region concludes that Section 10(j) relief is not warranted under the criteria set forth above, and the case is otherwise deferrable, the Region should defer under *Dubo* and/or *Collyer*, and apply regular post-arbitral Board policies.[36] If Section 10(j) relief has been requested and appears warranted, or the Region *sua sponte* concludes that Section 10(j) relief may be warranted, the Region should stay its action on the charge and submit the matter to Advice on the Section 10(j) issue, regardless of whether the case otherwise would be deferrable.[37]

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[35] Conversely, if the program involved only testing "for cause" or on some other limited basis, or if few or no current employees were at risk of being tested, Section 10(j) relief would probably not be warranted. Similarly, even where the program is extensive, Section 10(j) proceedings may be unwarranted, and deferral to arbitration appropriate, if the employer is willing to suspend the program pending arbitration or if the arbitration process can be quickly completed. Thus, in evaluating this aspect of a case, the Regions should inquire into 1) the current impact on unit employees, i.e., how many employees have been or are likely to be tested imminently; and 2) whether arbitration will expeditiously resolve the dispute.

[36] See *Olin Corp.*, 268 NLRB 573 (1984); *Armour & Co.*, 280 NLRB No. 96 (24 June 1986). Compare *Badger Meter, Inc.*, 272 NLRB 824 (1984) with *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977), enfd. 587 F.2d 403 (9th Cir. 1978).

[37] Of course, a Region must fully investigate the case and evaluate the merits of the charge before submitting a drug testing case to Advice with its 10(j) recommendation. The clarity of the violation is an element in evaluating the appropriateness of Section 10(j) proceedings.

VI. *Future Submissions to the Division of Advice*

As stated in General Counsel Memorandum 87-4 (2 July 1987) the Regions are no longer required to submit all cases involving drug testing to the Division of Advice. Henceforth, cases should only be submitted in the following circumstances:

1. The case presents novel or complex legal issues that are not resolved by this memorandum (see, e.g., ns. 14 and 29, supra, and accompanying text).

2. The Charging Party requests Section 10(j) relief, the investigation reveals prima facie merit to the charge, and the Region believes that Section 10(j) is warranted. However, if the Regional Director believes that 10(j) relief is clearly unwarranted, a meritorious case need not be submitted to Advice; rather, the Region may obtain telephonic clearance to deny the Charging Party's request from the Division of Operations-Management.[38] Where there is a close question as to the warrant for 10(j) relief, the case should be submitted to Advice.

3. A meritorious case presents circumstances posing the danger of irreparable injury, and the Region accordingly recommends *sua sponte* Section 10(j) relief.

/s/ROSEMARY M. COLLYER
Rosemary M. Collyer
General Counsel

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[38] Casehandling Manual (ULP) Section 10310.1, paragraph 2. Of course, a non-meritorious case even with a 10(j) request does not have to be submitted to Advice. *Id.*, at paragraph 5.

APPENDIX F

"UAW after 50 years: a reply to Victor Reuther"
Article by Owen Bieber

May 7, 1987

UAW after 50 years: a reply to Victor Reuther

by Owen Bieber

Victor Reuther's many contributions to the labor movement during his long tenure as a UAW staff member earned him great respect both within the union and throughout the world. world.(*sic*)

He tarnishes that reputation, however, with his ongoing attack on the UAW, which once again he details at length—this time in the guise of a "report" on the union's Convention last June.

Throughout our 50th anniversary year, the UAW provided Victor with numerous forums—a number of which I shared—at which he repeated his claim that the union is no longer the militant and democratic institution it was during his tenure.

His nostalgia, while understandable, is just plain wrong. Indeed, that the current debate is occurring is, I believe, a sign of the vitality and openness of the UAW.

His flawed analysis and factual errors are so numerous they would take many pages to correct, but some do require rebuttal.

First, the Saturn agreement. Victor criticizes the UAW for reaching an agreement with General Motors before GM has actually hired the Saturn workforce. He is joined by the National Right-to-Work Committee in this complaint (the Committee's legal action seeking to overturn the agreement failed).

We reached an agreement before the workforce was hired because we wanted to insure that Saturn would be located in the U.S. and that the UAW would be involved

in Saturn from day one—GM had to commit that the primary source for recruitment there will be active and laid-off UAW members.

Saturn vehicles will be built by UAW members in Tennessee—the same Right-to-Work state where Nissan assembles cars and trucks with non-union labor. A strong UAW presence at Saturn hopefully will provide additional impetus in organizing Nissan workers.

Victor fails to point out that the Saturn agreement can be changed at any time the workers there choose to alter it once the plant is operating. All they must do is inform GM they wish to reopen negotiations. After 30 days, if those negotiations don't yield an acceptable settlement, the UAW can serve notice on GM and strike the company five working days later.

All the UAW members initially hired into Saturn will enjoy permanent job security under the agreement. Workers will be paid by salaries rather than hourly wages—a long-time goal of Walter Reuther's. Skilled trades workers will get salaries equal to a starting base rate of $15.49 an hour and production workers will get the equivalent of $13.45 an hour, plus additional quarterly payments comparable to GM workers at other plants.

The total amount paid the workers will be the full yield under the national UAW-GM contract.

A year after the start up of commercial production, the base rates will be 80 percent of the average straight-time hourly earnings prevailing at other UAW-represented domestic auto manufacturers. Additional compensation—to be determined jointly by the union and the company—will be paid based on criteria such as cost-of-living, quality, profit-sharing, etc.

The agreement achieves another goal of Walter Reuther's—worker codetermination. The power of the workers at Saturn is real, with the agreement providing that either party "may block a potential decision." Workers will be represented at every step of the decision-making process.

In addition to protecting the right-to-strike, the agreement also maintains the traditional four-step grievance procedure ending in final and binding arbitration.

This is hardly an agreement that undercuts 50 years of UAW-GM bargaining, as Victor attempts to claim.

At the same time, as I made clear to UAW Convention delegates, we don't see Saturn as binding or in any way precedent-setting at any other GM plant or facility. It is a special project designed to maintain small car production with a high degree of domestic content in the U.S. at a time when foreign imports have taken 27 percent of our market and their share is moving higher.

There is no guarantee that the Saturn effort will achieve our goals—but it does insure that the workers will be represented by the union and will enjoy job security and full GM wages for the first year. If there are elements of the agreement that don't work, the UAW will renegotiate as provided for in the agreement. The workers will then ratify those agreements.

In fact, as stated earlier, the workers at Saturn will have the highest degree of democratic control over negotiated conditions because of their contractually-guaranteed right to reopen negotiations at any time.

The UAW faces a far different environment in the world auto industry than it did in the years Victor was

active in the UAW. For many years, the U.S. automakers competed among themselves in what was generally an expanding economy. Today, that competition has been joined by auto producers not only in Japan, and Europe but Korea, Mexico, Brazil, Taiwan and other low-wage countries.

Despite this, the UAW has not only maintained its wages and benefits, but bargained major economic gains at the same time we've won far-reaching job security provisions at the domestic auto companies.

Victor tries to contrast the UAW's performance with what has occurred in other countries, stating that "only in the United States have the great corporate interests like GM demanded concessions which they dare not ask of their workers in their British, German, French or Australian plants." Perhaps Victor failed to read last year of the collapse of strikes at Renault plants at Billancourt and Le Mans, France, following union efforts to win reinstatement of year-end bonuses.

Victor paints a picture of Nissan's exemplary conduct at its plant in Great Britain that is grossly inaccurate—he has Nissan recognizing the established unions and accepting prevailing collective bargaining agreements.

In fact, the Transport and General Workers Union and the Boilermakers and Allied Trades Union, which represent segments of the workforce at most auto plants there, are barred from the Nissan facility. The Amalgamated Engineering Union does have representation there, and although Nissan has conceded a limited recognition of the AEU, Nissan refuses any membership agreement, and only 15 percent of Nissan employees in England are union members.

AEU officials get involved only if invited to do so by members of a "company council" whose members need not belong to the union. Far from Victor's characterization, Nissan basically imposed an agreement there that contains concessionary provisions that amount to a virtual "no-strike" pledge.

Over time, hopefully, that agreement will be strengthened and improved, as I'm sure the AEU intends. But little good is done by Victor's attempt to portray Nissan in such a positive light when such a portrayal doesn't square with reality.

Equally flawed is his attempt to portray the UAW Convention as undemocratic and tightly orchestrated by the leadership. Anyone who was there can attest to the vitality of the debate. Moreover, the chair made a special effort to give opponents of proposed resolutions ample opportunity to speak.

Because full debate of collective bargaining issues is so essential to the UAW, we hold an entire Special Collective Bargaining Convention at which the same local union delegates discuss those issues over three days. If we are so afraid of debate, why do we continue this procedure, which began under Walter Reuther?

The delegates will meet in Chicago next April and have full and open debate relative to collective bargaining goals. Victor's real reason for being upset goes to the fact that, at the Anaheim Constitutional Convention, delegates by an overwhelming majority voted to end the debate and then chose to reject the amendment Victor supported on Saturn.

In the first installment of Victor's report in the *Review*, he makes a number of unfair and misleading claims.

As I made clear in my keynote speech at the Convention, the UAW will not tolerate misconduct or corruption. We were saddened and outraged by the conduct of a regional director convicted of corruption that occurred before his election as director while he was a local union president.

Victor correctly notes that the director was forced to step aside by the UAW when he was first indicted, but blames the UAW executive board for failing to investigate charges that had surfaced three years earlier. In fact, at the request of the UAW president at that time, UAW counsel reviewed the earlier charges and determined that there was no basis for barring this individual under the UAW Constitution.

In the interim, certain lawyers involved in paying kickbacks for workers compensation referrals decided to talk—a break that led to the conviction. Nothing the UAW board could have done would have been able to sustain the charges without that development.

This individual brought shame on the UAW. He has been found guilty by a jury of his peers and sentenced. But the fault was his own, not that of the UAW board. Once convicted, he was immediately removed from his UAW office. Victor also describes in detail his own view of a disputed election held at the Convention involving UAW Region 5, in which incumbent regional director Ken Worley defeated his former assistant, Jerry Tucker, by less than one delegate vote.

Victor casts aspersions on my role in handling that election by stating that "despite his openly expressed partisanship [for Worley], Bieber chaired the caucus where the assembled Region 5 delegates were to vote for their director."

I chaired the caucus because I was asked to by a delegation of Tucker supporters. That group met with my Administrative Assistant, Dick Shoemaker, and requested that I chair the caucus (or appoint a member of my staff to chair it) in order to insure it would be conducted in an open, fair and orderly manner. I agreed to their request.

What Tucker and the U.S. Labor Department argue is that certain delegates who supported Worley were improperly selected in their local unions to go to the Convention as delegates. The Convention's credentials committee heard Tucker's evidence and found it did not have merit.

More important, the UAW constitution does not provide for confirmation of regional election results by the entire group of Convention delegates. To do so would create a situation, for example, in which a union member could be duly elected as a regional director by the delegates of his or her region, but could be rejected by a majority of Convention delegates. Such a procedure could effectively move hotly contested races from regional contests among delegates from locals the director serves to national contests among all delegates.

Would Victor really rather have a system in which an insurgent could run a campaign and be elected as regional director only to be unseated by a vote of all Convention delegates? I doubt it.

I believe the Convention shows the UAW is, in fact, an open and democratic union. If we were not, how does Victor explain the ability of John Flynn to oppose incumbent Region 9A (New England) Director Ted Barrett and win?

Most incumbents who hold union office, including myself, are not excited about the possibility of being defeated by political challengers. I believe the way to keep that from happening is by being responsive to the membership I'm elected to serve.

Victor's problem is that the candidate he supported, Jerry Tucker, didn't win.

That's not a lack of democracy, but rather the outcome of it.

The UAW faces many problems today, but absence of democracy and militancy are not among them.

Victor Reuther reminds *Review* readers that those who fail to learn from the mistakes of the past are doomed to repeat them. I agree, but would also note that those who only remember the past may not know when it's over.

58 Union Democracy Review 4-5
May 1987

APPENDIX G

Letter from Donald L. Dotson, Chairman, National Labor Relations Board

December 12, 1986

SEAL | NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

12 December 1986

Mr. Glenn M. Taubman
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160

Dear Mr. Taubman:

I write in reply to your letter of 22 October 1986. Your immediate request was for intervention by the NLRB, acting as *amicus curiae*, in the certiorari proceedings involving *Beck v. CWA*, _____ F.2d _____, 123 LRRM 2289 (C.A. 4, 1986). Executive Secretary John C. Truesdale, on behalf of the Board, replied by letter dated 3 December 1986 to that request.

I understand that the Solicitor General, pursuant to a request of the Supreme Court, has since solicited the Board's views on this matter. Whether that solicitation seeks the Board's substantive views on the unfair labor practice issue in *Beck* or simply the advisability of granting a writ of certiorari, I cannot as yet say.

Your 22 October letter did raise a potential issue which, while not of immediate concern in the *Beck* situation, has serious implications for the administration of the National Labor Relations Act. You filed certain unfair labor practice charges some fourteen months ago. You state "From the outset, General Counsel Collyer has refused to make a determination on the merits of the

unfair labor practice charges, initially preferring to 'defer' action until the circuit courts issued decisions in *Beck* and *Price*." You quote a 3 October 1986 letter from the General Counsel stating that her office will continue to defer action "at least until we know whether the Supreme Court will be addressing the issues."

Section 3(d) of the NLRA provides that there shall be a General Counsel of the Board who "shall have final authority, on behalf of the Board, *in respect of the investigation of charges and issuance of complaints under section 10*, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."(emphasis supplied). Section 3(d) must be read in conjunction with other portions of the Act. These include: (1) Section 10(a) which provides that "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce;" (2) Section 10(b) which provides "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint. . . ." and (3) Sections 10(e) and 10(f) which provide respectively for the Board to seek enforcement of its orders in federal appeals courts and for aggrieved parties to seek review of Board orders.

The above statutory provisions must, in turn, be read in conjunction with the 1 April 1955 "Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board" (20 F.R. 2175, reprinted in *National Labor*

Relations Board Rules and Regulations and Statements of Procedure, pp. 301-306). Item I(A) of that Memorandum sets forth the duties and responsibilities of the Board's General Counsel with respect to complaint cases. Significantly, that list of duties and responsibilities includes "full and final authority and responsibility, on behalf of the Board" to accept and investigate charges filed, enter into and approve informal settlements of charges, to dismiss charges, handle consolidation and severance of cases, to issue complaints and notices of hearing, to appear before Administrative Law udges (then designated as "Trial Examiners") in unfair labor practice matters, prosecute injunction proceedings under 10(1) of the Act, and to file exceptions and briefs before the Board. The General Counsel may also argue orally before the Board subject to its rules and regulations. Nowhere in 20 F.R. 2175 is the General Counsel of the Board given authority to defer or significantly delay the processing of unfair labor practice charges.

Such delay effectively bypasses the NLRA statutory framework by denying to the Board the opportunity to perform in its congressionally designated role as the initial creator of the national labor policy. That role vis-a-vis Sections 8 and 9 of the Act has been recognized and protected by the Supreme Court. Thus in *NLRB* v. *Action Automotive, Inc.*, 118 LRRM 2577 at p. 2580, Chief Justice Burger, writing for the majority, stated: "However, we do not make labor policy under Section 9(b); Congress vested that authority in the Board, which brings its extensive experience in the administration of the Act to bear on questions of unit determinations." Justice Powell, interpreting Section 8(b)(1)(A) of the Act for the Court in *Pattern Makers League* v. *NLRB*, 119 NLRB 2928 at p. 2936 announced:

> The Board has the primary responsibility for applying 'the general provisions of the Act to the complexities of industrial life.' *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496, 101 LRRM 2222 (1979), quoting *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236, 53 LRRM 2121 (1963), quoting *NLRB* v. *Steelworkers*, 357 U.S. 357, 362-363, 42 LRRM 2324 (1958).

Justice White, concurring in *Pattern Makers* at p. 2937 observed:

> For the Act to be administered with the necessary flexibility and responsiveness to 'the actualities of industrial relations,' *NLRB* v. *Steelworkers*, 357 U.S. 357, 362-364, 42 LRRM 2324 (1958), the primary responsibility for construing its general provisions must be with the Board, and that is where Congress has placed it. '[W]e should 'recognize without hesitation the primary function and responsibility of the Board' to apply these provisions to particular and often complex situations. '*Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496, 101 LRRM 2222 (1979), quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499, 45 LRRM 2705 (1960). Where the statutory language is rationally susceptible to contrary readings, and the search for congressional intent is unenlightening, deference to the Board is not only appropriate, but necessary.

This language is no mere rhetoric thrown out for the occasion. The Supreme Court has acted in the past to preserve the Board's central position as the maker of the national labor policy. See *NLRB* v. *Food Store Employees, Local 347 (Heck's, Inc.)*, 86 LRRM 2209 (1974) and *South Prairie Construction Co.* v. *Engineers*, 92 LRRM 2507 (1976). In each of these cases, the Supreme Court reversed the District of Columbia Court of Appeals because it had invaded the Board's province. In *South Prairie*, the D.C. Circuit, after reversing a Board finding on a single employer issue, went on to determine for itself the appropriate Section 9 bargaining unit. In *Heck's Inc.*, that same court rewrote the Board's remedial order in an 8(a)(1) and (5) case to reimburse the charging party for litigation and excess organizational costs. Applying the teaching of *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) the Supreme Court directed the D.C. Court of Appeals in each case to remand these questions to the Board for initial determination. It stated in *Heck's, Inc.*, supra, at p. 2211:

> Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action . . . as will effectuate the policies of the Act.' (citations omitted)

Just as definitively, it said in *South Prairie*, supra, at p. 2509:

> Whether or not the Court of Appeals was correct in this reasoning [about the Section 9 unit question], we think that for it to take upon itself the initial determination of this issue was 'incompatible with the orderly function of the process of judicial review'. . . . In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under Section 9, the Court of Appeals did not give 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.' (citations omitted)

A certain tension exists between the NLRB's judicially approved function as the maker of the national labor

policy and the discretionary powers of this agency's General Counsel. The latter are frequently described as being "unreviewable." See, e.g., *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) and *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Where the General Counsel of the Board fails to issue complaint, the issues involved in the charge cannot be decided by the Board. If the General Counsel's policy attitudes concerning particular legal factual complexes become known—and sufficient information in the form of quarterly reports and advice memoranda is available to *ensure* that those attitudes become public knowledge—parties are discouraged even from the filing of charges. Awaiting a change in an individual General Counsel's position or a change in the identity of the General Counsel is impracticable because of the short statute of limitations embodied in Section 10(b) of the Act. For these and similar reasons, the "unreviewable discretion" of the Board's General Counsel has been heavily criticized in academic circles. See *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, Jonathan B. Rosenblum, 86 Yale Law Journal 1349 (1977).

While the federal courts have subscribed to "unreviewable agency discretion," that legal singularity has clearly generated discomfort. That discomfort has expressed itself in the shape of narrowly drawn exceptions to the general rule. Thus where agency action was in excess of delegated powers and contrary to specific statutory prohibition, the Supreme Court has subjected that agency action to judicial oversight. See *Leedom* v. *Kyne*, 43 LRRM 2222 (1958).

While, as far as I am aware, no court has ever directed the General Counsel to issue a complaint, at least one

court has directed the General Counsel to proceed with his statutory task of investigating and evaluating the merits of a charge. *Southern California District Council of Laborers, Local 1184* v. *Ordman*, 75 LRRM 2380 (C.D. Cal. 1970). In *Mobilab Union* v. *Johansen*, 118 LRRM 2903 (D.C.N.J., 1985), District Judge Gerry discussed the exceptions to "unreviewable discretion" at length. After discussion of *Leedom* v. *Kyne* and its progeny, Judge Gerry stated:

> The third exception to the rule of unreviewability, and this one recognized by the courts, is for review of Board actions which may violate constitutional rights.

Those rights included, in Judge Gerry's estimation, "the right to an explanation and the right of an administrative appeal."

Mobilab, by implication, raises the question of a party's rights in the situation where the agency's General Counsel has failed either to find merit in a charge and issue complaint or determine that the charge lacks merit and dismiss it. Judicial oversight, based in part on the Administrative Procedure Act, 5 U.S.C. 706(1) has been exercised in such cases. In *Deering Milliken, Inc.* v. *Johnston*, 48 LRRM 3162 (C.A. 4, 1961) the Board had directed a second remand of an unfair labor practice proceeding. Respondent in the Board case sought judicial relief on the ground that the Board was not proceeding with reasonable dispatch to dispose of the case. Judge Haynesworth, writing on behalf of the Court, first pointed out that the "reasonable dispatch" language of the Administrative Procedure Act was "no precatory declaration. It is an enforceable command. . . ." *Deering Milliken, Inc.*, supra at p. 3166. He then declared at pp. 3166-3167:

> The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902. . . . As a corollary of that doctrine, it has long been recognized that a federal court, upon complaint of an injured party, has jurisdiction to compel administrative action wrongfully withheld in violation of a statutory duty to act. (citations omitted)

The extraordinary remedy of mandamus has been considered appropriate in instances where a federal body has failed to resolve disputes entrusted to it. See *Telecommunications Research and Action Center* v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984). While the Court did not issue a writ of mandamus, the failure to do so was occasioned only by the fact that the FCC assured the Court that it was moving expeditiously on the disputes before it. The Court retained jurisdiction to monitor the FCC's compliance with its promises. The Court noted also that the All Writs Act (28 U.S.C.A. 1651(a)) effectively made it the proper forum in which to seek such relief because it was protecting its prospective jurisdiction.

I cannot predict with any certainty how the law in this area will develop. I do believe, however, that the question of the Board's ability to address policy questions on a case-by-case basis will eventually have to be faced.

Sincerely,

/s/ DONALD L. DOTSON
Donald L. Dotson
Chairman
National Labor Relations Board

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.

No. 87-1757

In the Supreme Court of the United States

OCTOBER TERM, 1987

REX H. REED, PETITIONER

v.

ROSEMARY M. COLLYER,
GENERAL COUNSEL OF THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether a decision by the General Counsel of the National Labor Relations Board not to issue a complaint in response to unfair labor practice charges filed by petitioner is subject to judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1757

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ROSEMARY M. COLLYER,
GENERAL COUNSEL OF THE
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 837 F.2d 1091 (Table). The opinion of the district court (Pet. App. 3a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1988. The petition for a writ of certiorari was filed on April 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 7, 1985, petitioner Rex H. Reed, an official of the National Right to Work Legal Defense Foundation, filed unfair labor practice charges against General

Motors Corporation (GM) and the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW), with the National Labor Relations Board's Regional Office in Detroit, Michigan (Pet. 2). The charges alleged that GM and the UAW had violated Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act (29 U.S.C. 158(a)(1), (2), and (3), 158(b)(1)(A) and (2)) by entering into and giving effect to the so-called "Saturn Agreement." That agreement gives employment preference, at an automobile manufacturing plant that Saturn Corporation, a GM subsidiary, planned to construct in Spring Hill, Tennessee, to GM employees in the unit currently represented by the UAW, and purports to recognize the UAW as the collective bargaining representative of the employees at the Saturn plant (Pet. 2-3). The Regional Director conducted a preliminary investigation and, pursuant to agency policy,[1] referred the charges to the General Counsel's Division of Advice in Washington, D.C. (Pet. App. 5a).

After receiving written statements and oral argument, the Division of Advice concluded that the unfair labor practice charges should either be withdrawn or dismissed (Pet. App. 13a-24a). It noted that "GM and the UAW have had a long and productive collective bargaining relationship" and that, as "[i]n any collective bargaining relationship, there is an obligation to bargain over the effects of a decision that could have a significant adverse impact on the unit employees" (*id.* at 17a). Indeed, it noted that many provisions of the GM-UAW collective bargaining

[1] The Board's casehandling policies provide that regional directors should refer "novel, complex, or doubtful issues or policy issues" to the Division of Advice. See *NLRB Casehandling Manual (Part One)* (Pt. 1) § 11751.1 (1983); see generally *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 141-142 (1975).

agreement "represent a clear commitment by GM • • • to avoid job loss in the event of changes in the operation of the enterprise" and that "[t]here is no allegation that any of these commitments is illegal" (*id.* at 18a). It then found that the construction of the Saturn facility could "have a major impact on current unit employees" because it could lead to reduction, closure or conversion of other GM plants (*id.* at 19a-20a). The Division of Advice thus concluded that the Saturn Agreement, insofar as it gives an employment preference to GM employees in the unit currently represented by the UAW, "is the lawful product of required bargaining" (*id.* at 20a).

The Division of Advice rejected petitioner's argument that, by entering into the Saturn Agreement, GM had discriminated against those who are not members of the UAW (Pet. App. 20a-24a). It said that "the evidence does not establish such discrimination" (*id.* at 20a), noting that the preference was based on whether an employee was in the bargaining unit represented by the UAW, not on whether an employee was a member of the UAW, and that, given Tennessee's status as a right-to-work state, employees hired at the Saturn plant would have no obligation to maintain union membership (*id.* at 20a-21a). It distinguished Board precedents where hiring preferences had been condemned, noting that those cases involved preferences that were extended to employees of wholly unrelated employers that the union represented, and not simply preferences extended to the employer's own employees (*id.* at 22a).

The Division of Advice also concluded that, under the principles set forth in *Houston Division of the Kroger Co.*, 219 N.L.R.B. 388 (1975), the Saturn Agreement did not constitute an unlawful premature recognition of the UAW (Pet. App. 24a-25a). It explained that, under *Kroger*, an agreement to recognize a union at a future facility is con-

strued by the Board as an agreement that conditions such recognition on the union's actual attainment of majority support (*id.* at 25a). Accordingly, insofar as the Saturn Agreement provides for recognition of the UAW as the representative of the Saturn plant employees, it "is, in law, an agreement to recognize the UAW at Saturn, in [the] future, if and when the UAW achieves majority support there" (*ibid.*).

Finally, the Division of Advice declined to "decide at this time" whether it would be lawful for GM and the UAW to enter into "a functioning collective bargaining relationship before UAW achieves majority status among employees working at Saturn" (Pet. App. 28a). It acknowledged that "[t]hat issue is not free from doubt" (*id.* at 26a). But it found that the "current evidence is insufficient to establish that GM and UAW have acted at variance with the *Kroger* principles • • •, *i.e.*, that they have entered into a functioning collective bargaining relationship before any employees have begun working at [the Saturn plant]" (*id.* at 25a). Thus, it found it unnecessary to "pass on the issue" whether they could lawfully do so (*ibid.*). It added that, if further developments indicated that GM and the UAW had actually entered into a functioning collective bargaining relationship at the Saturn plant, a new unfair labor practice charge could be filed to present that issue (*id.* at 28a).

2. Upon the Regional Director's dismissal of the unfair labor practice charges, petitioner filed an appeal with the Office of Appeals of the General Counsel (Pet. App. 8a). The parties submitted additional written statements in support of their positions (*id.* at 9a). On November 14, 1986, the General Counsel, through her Office of Appeals, sent petitioner's attorney a letter denying the appeal (*id.* at 8a-12a).

The General Counsel first rejected petitioner's contention that her refusal to issue a complaint was inconsistent with the Board's decision in *Kroger Co.* (Pet. App. 8a-9a).

She stated that the *Kroger Co.* decision fully supports "the conclusion that the Saturn Agreement is, as a matter of law, subject to the condition subsequent that the UAW must obtain majority support prior to actual recognition" (*id.* at 8a). She noted that "it is clear that this recognition, if contained in the GM-UAW National Agreement covering current bargaining unit employees, would not be unlawful" (*id.* at 8a-9a), and concluded that "[t]he mere fact that it is included in a separate Memorandum of Agreement between the UAW and Saturn, which clearly has single employer status with General Motors, cannot render it unlawful" (*id.* at 9a).

Finally, the General Counsel found that petitioner's "contention that all employees will be required to become members of the UAW as a result of the Saturn Agreement is incorrect" (Pet. App. 10a). She noted that the union security clause in the agreement "requires union membership only 'to the extent permitted by law,' " and that Tennessee has a right-to-work law. Thus, she stated (*ibid.*):

> [C]ontrary to your contention on appeal, General Motors has not granted hiring preferences at the Saturn facility on the basis of UAW membership; rather, these preferences have been extended to GM employees who are represented by the UAW regardless of their individual status vis-a-vis the Union. An Employer does not violate the law when it prefers its own employees for transfer as long as that preference is based on employment status and not on union membership. • • • [T]he UAW has merely negotiated initial transfer rights for bargaining unit employees whom it presently represents. There can be no doubt that as the exclusive bargaining representative of these employees, the UAW is authorized to negotiate for them on the subject of their transfer

> rights particularly where, as here, the Employer's creation of job opportunities elsewhere may adversely impact their current employment status.

3. Petitioner responded by filing a complaint for declaratory and injunctive relief in the United States District Court for the Middle District of Tennessee, seeking to compel the General Counsel to issue an unfair labor practice complaint (Pet. App. 4a). The district court, however, found that "[t]he law is well settled that the decisions of the General Counsel for the NLRB are not subject to judicial review" (*id.* at 5a (footnote omitted)); that "the Supreme Court has consistently upheld the unreviewable discretion of the General Counsel in this regard" (*id.* at 6a); and that the "principle of unreviewability has been asserted by all the circuits" (*id.* at 7a). It thus dismissed the complaint for lack of subject matter jurisdiction (*ibid.*).

4. The court of appeals affirmed (Pet. App. 1a-2a). Like the district court, it found that the "General Counsel's decision not to issue an unfair labor practice complaint is not subject to judicial review" (*id.* at 2a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. This Court has long recognized that a determination by the General Counsel not to issue an unfair labor practice complaint is not subject to judicial review. See, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 9; *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). Thus, in *Sears*,

the Court noted that, in Section 3(d) of the Act (29 U.S.C. 153(d)), Congress delegated to the General Counsel "the unreviewable authority to determine whether a complaint shall be filed" (421 U.S. at 138). The Court explained (*id.* at 139):

> The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

The courts of appeals, accordingly, have consistently refused to allow review of the General Counsel's prosecutorial decisions. See, *e.g.*, *Lincourt* v. *NLRB*, 170 F.2d 306, 307 (1st Cir. 1948); *National Maritime Union* v. *NLRB*, 423 F.2d 625, 626-627 (2d Cir. 1970); *Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416, 426 (3d Cir. 1973); *Associated Builders* v. *Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979), cert. denied, 446 U.S. 965 (1980); *Hernandez* v. *NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Mayer* v. *Ordman*, 391 F.2d 889, 890 (6th Cir.), cert. denied, 393 U.S. 925 (1968); *Rockford Redi-Mix Co.* v. *Zipp*, 632 F.2d 30, 32-33 (7th Cir. 1980), cert. denied, 450 U.S. 929 (1981); *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1040 (8th Cir. 1976); *General Drivers, Local 886* v. *NLRB*, 179 F.2d 492 (10th Cir. 1950); *Bandlow* v. *Rothman*, 278 F.2d 866 (D.C. Cir.), cert. denied, 364 U.S. 909 (1960).

2. Petitioner acknowledges (Pet. 7) that the General Counsel's prosecutorial decisions are generally unreviewable, but contends (*ibid.* (emphasis omitted)) that "this atypical case presents the unique issue of whether the General Counsel's arbitrary refusal to adhere to her own

stated standard for issuing complaints violates petitioner's due process and equal protection rights." This contention is both unfounded and meritless.

Contrary to petitioner's assertion (Pet. 16), the General Counsel did not ignore her own prosecutorial policy. The Division of Advice expressly found (Pet. App. 20a, 25a) that the evidence was "insufficient to establish that GM and UAW • • • have entered into a functioning collective bargaining relationship before any employees have begun working at [Saturn]," and, therefore, that under the Board's decision in *Kroger Co.*, "the Saturn Agreement is, in law, an agreement to recognize the UAW at Saturn, in [the] future, if and when the UAW achieves majority support there" (Pet. App. 25a). Thus, while the General Counsel generally does issue complaints where arguable violations are found, no such arguable violation existed here.

To be sure, the Division of Advice suggested that the legal question whether it would be lawful for GM and the UAW to enter into a functioning collective bargaining relationship before any employees had begun working was "not free from doubt" (Pet. App. 26a). But that question was not presented on the facts of the case, and the Division of Advice therefore expressly declined to address it (*id.* at 25a, 28a). In doing the same, the General Counsel did not in any way ignore a proper charge concerning an arguable violation of the law; no arguable violation of the law had been established on the facts of the case.

In any event, even if the General Counsel had determined not to issue a complaint despite the existence of an arguable violation, that action would not be subject to judicial review. It is settled that " 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as

race, religion, or other arbitrary classification' " (*Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978), quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)). While petitioner attempts (Pet. 18-19) to liken the situation here to the "dismissal of unfair labor practice charges of black employees because they are black, female employees because they are female, or blond[] employees because they are blond[]," there is in fact no basis here for suggesting that petitioner's charges were dismissed because of his membership in a protected class, or for any other invidious reason. And no constitutional violation is established by petitioner's contention (Pet. 15) that the failure to issue a complaint deprives him of the benefits of the Act: A person who files an unfair labor practice charge has no constitutional right to have an unfair labor practice complaint issue. *Saez* v. *Goslee*, 463 F.2d 214, 215 (1st Cir.), cert. denied, 409 U.S. 1024 (1972); *International Ass'n of Machinists* v. *Lubbers*, 681 F.2d 598, 603 (9th Cir. 1982), cert. denied, 459 U.S. 1201 (1983). "Indeed, if a right to have a complaint issue can be said to exist at all, it exists subject to the limitations contained in the Act, including the exercise of discretion by the General Counsel." *Mobilab Union, Inc.* v. *Johansen*, 600 F. Supp. 826, 829 (D.N.J. 1985).

3. Finally, petitioner errs in suggesting (Pet. 13-15) that the decision below is inconsistent with this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), which involved no review of the General Counsel's exercise of enforcement discretion. In *Kyne*, the Board directed a representation election in an admittedly mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit," as expressly required by Section 9(b)(1) of the Act (29 U.S.C. 159(b)(1)). The Court held that this decision, which was not review-

able through the appellate review procedures established in the Act, could be reviewed by a district court because the Board's action was "in excess of its delegated powers and contrary to a specific prohibition in the Act" (358 U.S. at 188). Here, there is no doubt that the General Counsel has the power, under Section 3(d) of the Act, to refuse to issue a complaint; she has the unreviewable discretion to decline to issue a complaint, even where there is an arguable violation, in order to further the policies of the Act. *Kyne* does not authorize judicial review in this context. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964) (*Kyne* does not sanction district court review "whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law"); see also *Schilling* v. *Rogers*, 363 U.S. 666, 676 (1960).[3]

[3] For similar reasons, *Harmon* v. *Brucker*, 355 U.S. 579 (1958), is of no help to petitioner. *Harmon* presented the question whether the Secretary of the Army had acted in excess of his statutory powers by looking at pre-induction records in issuing discharge papers. See 355 U.S. at 583. As shown above, no similar issue of statutory authority is presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/80487

REPLY

BRIEF

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

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v.

ROSEMARY M. COLLYER,
GENERAL COUNSEL OF THE NATIONAL
LABOR RELATIONS BOARD

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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June 2, 1988

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22.5 of the Rules of this Court, the Petitioner files this short Reply Brief in support of his

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

A. The Instant Case Presents More Than The Already Answered Question Of Whether The General Counsel Of The National Labor Relations Board's Refusal To Issue A Complaint Is Subject To Judicial Review In Routine Cases Not Presenting A Constitutional Issue.

In an effort to persuade this Court to deny the instant petition, Respondent studiously ignores the crux of this case, to wit: whether the statutory grant of authority to the General Counsel of the National Labor Relations Board under 29 U.S.C. § 153(d), Section 3(d) of the National Labor Relations Act, is so sweeping as to deny the federal courts of jurisdiction to even consider whether the General Counsel exercised her authority in a manner that fails to comport with the most basic notions of constitutional due process.

Respondent's patent misrepresentation of the issues presented is evident from the intellectually dishonest and simplistic manner in which she recasts the "Question Presented", carefully omitting its most basic point.[1]

[1] The Respondent's brief in opposition contains arguments which would be appropriate if the courts below had concluded that the complaint fails to state a claim under Fed.R.Civ.P. 12(b)(6) rather than that they had no jurisdiction to reach such a conclusion, under 12 (b)(1).

The General Counsel's statement of the issue sidesteps the true issue to present one not raised and which the parties do not dispute.

True Issue	General Counsel's "Issue"
"Whether the authority of the General Counsel of the National Labor Relations Board, exercised pursuant to § 3(d) of the National Labor Relations Act (29 U.S.C. § 153(d)), is immune from the judicial review under 28 U.S.C. §§ 1331 and 1337 where: a) the authority has been exercised in a manner that violates the United States Constitution; and b) the General Counsel has announced a standard for exercising § 3(d) authority that provides for issuance of an unfair labor practice complaint when an unfair labor practice charge presents an arguable violation of the National Labor Relations Act, has found an arguable violation in petitioner's case, but nonetheless and without rational basis, has refused to exercise her authority consistent with the standard announced."	"Whether a decision by the General Counsel of the National Labor Relations Board not to issue a complaint in response to unfair labor practice charges filed by petitioner is subject to judicial review."

The General Counsel's statement of the issue, by issue avoidance, is a tacit recognition that she cannot prevail on the issue Petitioner raises. That issue concerns the power and authority of federal district courts to consider constitutional claims. The lower courts held that, where the defendant is the General Counsel, no such power exists. Clearly, the General Counsel has recast the issue; we submit that this is because she has furnished, and can furnish, no citation supporting her view that federal district courts have no jurisdiction to decide constitutional issues.

Petitioner long ago conceded that in the *typical* case where the General Counsel has exercised her authority pursuant to Section 3(d), that authority or discretion is "unreviewable," and that the process that Congress envisioned when it enacted Section 3(d) was meant to deny an individual the "right" to pursue a court remedy to address the unfair labor practice charge presented. See *Vaca v. Sipes*, 386 U.S. 171 (1967) and authorities cited at p. 10 of the petition itself herein. However, the subject to be resolved by the Court in this case is *whether when Congress granted the General Counsel of the National Labor Relations Board the "final" authority to issue unfair labor practice complaints, it also deprived the federal courts of their inherent power to provide equitable relief should the General Counsel exercise this authority in an unconstitutional manner.*

Respondent's failure to address this crucial question of constitutional jurisprudence at all, the sole question raised by the petition, underscores the serious problem with any contention that the federal courts lack jurisdiction to consider constitutional challenges. Furthermore,

Respondent's suggestion that because Petitioner is not a member of a protected class, he is not entitled to constitutional protection, is nonsense and begs the question of whether *any individual* who is subjected to denial of constitutional rights through administrative action can be without a federal court forum. It is not, and could not be, that only persons in special protected classes have constitutional rights. Petitioner has the right to have his charge evaluated on the same basis as all other people; "does an arguable violation exist", whether or not he is in some "protected class". *That* is his due process claim that the courts below concluded they had no jurisdiction to consider. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936).

The General Counsel admits that one particular issue raised by the Petitioner's charges, which she dismissed in their entirety, is "not free from doubt", and therefore "arguable". However, she develops and uses nonexistent facts to justify having dismissed them. Otherwise, on her own standard, "arguability", a complaint should have issued in Petitioner's favor, at least on that segment of the charge. Since it did not, and no *valid* justification can be given, Petitioner was denied his due process rights under the Fifth Amendment, and the district court had jurisdiction to consider that claim. For, to apply an "arguability" standard in some cases but not in other indistinguishable cases is the essence of a due process denial which the courts have jurisdiction to rectify.

B. The Respondent's Transparent Efforts To Conceal The Actual Facts Of The Instant Case Cannot Be Used To Shield The General Counsel From Court Consideration Of Her Unconstitutional Acts.

Respondent's argument, that the issue of whether General Motors and the United Auto Workers had actually entered into a collective bargaining agreement was not presented by the facts of the unfair labor practice charge filed in the instant matter, is unconscionable in light of the clearly defined record. On that record, there is no factual predicate whatsoever for the General Counsel's conclusion in this regard. Either there is a functioning collective bargaining relationship at Saturn, or there is not. The General Counsel cannot legitimately claim to "find" facts that do not exist, and then decide a case upon the basis of the same nonexistent facts. Yet, that is precisely what she has done here, and exactly what she claims the courts have no power to review. On point, this Court is once again directed to UAW President Owen Bieber's admission, which the General Counsel ignores, in the May, 1987 UNION DEMOCRACY REVIEW:

> *We reached an agreement before the workforce was hired because we wanted to insure that Saturn would be located in the U.S. and that the UAW would be involved in Saturn from day one . . . .*

Oblivious to this admission, the General Counsel states that "the investigation of the instant charge does not support the allegation that GM is now recognizing the UAW". Appendix D at 28a.

For the Respondent to continue to insist that there was no collective bargaining agreement when the parties to it admit there is one represents skulduggery at its worst and should not be tolerated by this Court. The instant matter brings to mind the old saying that "if it walks like a duck, talks like a duck and looks like a

duck, it must be a duck". If the collective bargaining agreement between General Motors and the UAW says its an agreement, both of the signatories say its an agreement, and the agreement looks like an agreement, then it *must* be an agreement. For the General Counsel, to slough off the issues in the case by simply saying there was no agreement requires the supervisory remedial powers of the federal courts which until now serve as the guardians of *everyone's* constitutional due process and equal protection rights. Surely, the General Counsel's "findings" contrary to the admissions of the parties cannot defeat what is otherwise an "arguable" violation of the law, or the jurisdiction of the courts to consider whether such actions violate due process and equal protection principles.

C. Having Failed To Justify The Unconstitutional Acts Of The General Counsel Through Arguments Raised Below, Respondent Has Now Resorted To A New Position, First Advanced In This Court.

The General Counsel's claim that she has "unreviewable discretion" not to issue a complaint, even where there is an "arguable violation" of the law is an inadmissible *post hace* argument. It was not asserted by the General Counsel in her memoranda "justifying" refusal to issue a complaint; it was not raised in the courts below; and it should not be considered here as rationale to support her position. *Steagald v. United States*, 451 U.S. 204, 212 (1981); *Radio Officers Union v. NLRB*, 347 U.S. 17 n.35 (1954). Indeed, the need the General Counsel perceives to inject this argument now is a further admission that her other arguments lack merit.

CONCLUSION

This Court should not allow itself to be misled by the Respondent's efforts to mischaracterize the issues in this case as presenting only questions of "unreviewable discretion" where no constitutional issues are presented. In a situation such as the one presented in this case, this Court's *certiorari* review is warranted. It is respectfully submitted that this case, if accurately stated, deserves other than the short shrift that Respondent suggests. For the reasons stated herein, and in the petition for a writ of certiorari, the instant petition should be granted.

Respectfully submitted,

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Dated: June 2, 1988

SUPPLEMENTAL

BRIEF

No. 87-1757

Supreme Court, U.S.
FILED
JUN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REX H. REED,

Petitioner,

v.

ROSEMARY M. COLLYER,
GENERAL COUNSEL OF THE NATIONAL
LABOR RELATIONS BOARD

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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June 21, 1988

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No. 87-1757

IN THE SUPREME COURT OF THE UNITED STATES

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, Petitioner files the following supplemental authority in support of its petition for a writ of certiorari.

On June 15, 1988 this Honorable Court issued its decision in Webster, Director of Central Intelligence v. Doe, No. 86-1294. The issue presented in Webster v. Doe was whether, and to what extent, the termination decisions of the Director of the CIA are judicially reviewable. In Webster, the plaintiff maintained that the federal court's ability or power to hear his claim was grounded in both the Administrative Procedures Act, 5 U.S.C. § 701 et seq. and the United States Constitution.

Citing Johnson v. Robison, 415 U.S. 361 (1974) and Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), two cases heavily relied upon by Petitioner in its petition, this Honorable

Court concluded that to avoid the "'serious constitutional question' that would arise if a federal statute were construed to deny a judicial forum for a colorable constitutional claim", it would require a heightened showing of Congressional intent. Webster v. Doe, 86-1294, slip op. at 10. Finding no clear Congressional intent, this Court held that nothing in the statute considered therein precluded the plaintiff from pursuing his constitutional claim in the federal district court.

In the instant petition, it is respectfully submitted that the same considerations come into play. There is no clear Congressional statement evidencing that when Congress enacted 29 U.S.C. 153(d) of the National Labor Relations Act, it intended to limit the traditional supervisory power of the

federal courts to hear constitutional claims. For the reasons articulated in Webster v. Doe, and stated to the Court in this petition, we believe that the crucial question of constitutional law presented by the issues raised in Reed v. Collyer No. 87-1757, are deserving of this Court's certiorari consideration.

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OPINION

SUPREME COURT OF THE UNITED STATES

REX H. REED *v.* ROSEMARY M. COLLYER ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-1757. Decided June 27, 1988

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, dissenting.

This is a suit against the General Counsel of the National Labor Relations Board, alleging that in dismissing unfair labor practice charges filed by petitioner she violated petitioner's due process and equal protection rights under the Fifth Amendment. The District Court, in an unpublished opinion, dismissed the suit on the ground that the General Counsel's decision to dismiss was not subject to judicial review. The United States Court of Appeals for the Sixth Circuit, also in an unpublished opinion, affirmed. 837 F. 2d 1091 (1988) (Table).

While this petition for certiorari was pending, this Court decided *Webster* v. *Doe*, 486 U. S. —— (1988), applying for the first time the principle that Congress' intent to preclude judicial review of "constitutional claims" must be expressed with greater clarity than its intent to preclude judicial review of other claims. *Id.*, at ——. The statute that *Webster* found insufficiently clear for that purpose pertained to the Central Intelligence Agency, and provided that "[n]otwithstanding . . . the provisions of any other law, the Director of Central Intelligence, may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." 50 U. S. C. § 403(c). The statute at issue in the present case pertains to the NLRB, and provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the inves-

tigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board . . . ." 29 U. S. C. §153(d). The present case, involving constitutional claims, is unquestionably a prime candidate for application of the new principle we adopted in *Webster*. While the area of administrative activity to which the suit pertains (enforcement discretion) is one in which agencies have traditionally been accorded broad insulation from judicial review, see *Heckler* v. *Chaney*, 470 U. S. 821 (1985), so was the area of managing the nation's intelligence services at issue in *Webster*. And the text of the statute in *Webster* was much more suggestive of total unreviewability.

Petitioner has filed a Supplemental Brief persuasively arguing that *Webster* supports his position. Our denial of his petition is a puzzling departure from our standard practice of *remanding* (without opinion) pending cases whose outcome could well be affected by a decision we have promulgated after the judgment below. See R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice §5.12, p. 279 (6th ed. 1986). If we adhere to the rationale of *Webster*, we should certainly grant this petition for certiorari, vacate the judgment of the Sixth Circuit, and remand this case for reconsideration in light of *Webster*. It was my view that the rationale of *Webster* was wrong, because it did not square with the outcome of perfectly commonplace and perfectly correct decisions such as that of the Sixth Circuit here. See 486 U. S., at —— (SCALIA, J., dissenting). I would grant certiorari in this case in order to begin the necessary process of limiting *Webster* to its facts.